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UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

A. L. HALEY,

Petitioner,

vs.

JOHN D. POPE,

Respondent.

In the Matter of A. L. HALEY, Bankrupt.

PETITION FOR REVISION

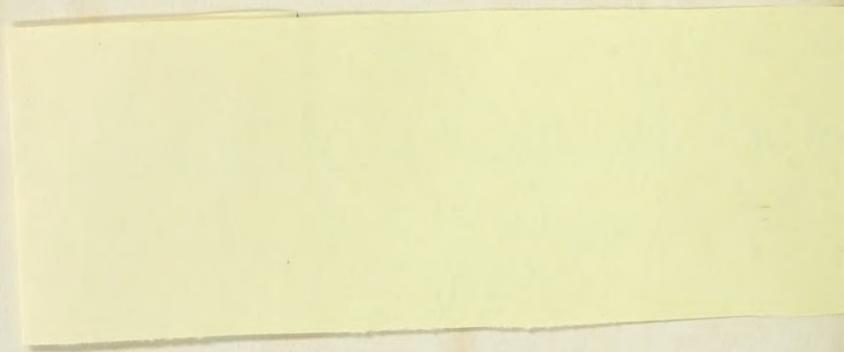
Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law,
a Certain Order of the United States District
Court for the Southern District of Cali-
fornia, Southern Division.

FILED

JUL 25 1911

Rounds of U.S. Court-Court
Appeals

754



No. 1997

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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Attorneys for John D. Pope, Objecting
Creditor. [2*]

[Report of Special Master.]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

No. 347.

In the Matter of A. L. HALEY,

Bankrupt.

**REPORT OF SPECIAL MASTER ON PETITION
OF BANKRUPT FOR DISCHARGE
AND UPON THE SPECIFICATIONS OF
OPPOSITION THERETO OF JOHN D.
POPE, A CREDITOR.**

To the Honorable OLIN WELLBORN, Judge of
said Court:

I, Lynn Helm, Referee in Bankruptcy to whom
said matter was referred as special master on the
25th day of January, 1910, upon the petition of the
said bankrupt for a discharge, filed November 18,
1909, and the objections of John D. Pope to said dis-

* Page-number appearing at foot of page of original certified Record.

charge of said bankrupt, filed December 29, 1909, to ascertain the facts and to report the same with my conclusions thereon, having been attended by counsel for said bankrupt, R. L. Horton, Esq., and by Messrs. Shankland & Chandler, attorneys for John D. Pope, the objecting creditor, and having heard the evidence produced before me and the argument of counsel, and being fully advised in the premises do report as follows:

Said matter came on to be heard before me immediately after the order of reference made herein, but was, by agreement of attorneys for said bankrupt, continued from time to time until the 2d day of November, 1911, and thereafter the testimony taken upon said hearing was to be written up and [3] was not furnished to me until this day, February 20th, 1911.

The stenographer's transcript of this testimony, together with the assignment of the judgment recovered in the Superior Court of the State of California, in and for the County of Los Angeles, in the case of C. E. Fish vs. A. L. Haley, for the sum of \$1054.66, and costs, which was all the evidence offered before me on this hearing, I return herewith, together with the files and papers in this matter.

The opposition to said discharge is based upon the following grounds of opposition, namely: That said bankrupt made a false oath in relation to the proceedings in bankruptcy, in that during the examination of said bankrupt in the course of the bankruptcy proceedings before the referee in charge of said proceeding, and having jurisdiction thereof, the bank-

rupt, being first duly sworn, testifies that he was the owner of 1250 shares of the capital stock of the A. L. Haley Architect Company, a corporation, and that he had pledged said stock with M. B. Greenwood, as security for an indebtedness which he owed to the said M. B. Greenwood; and subsequently the said bankrupt, during another examination of said bankrupt before said referee, the said bankrupt being first duly sworn, in reference to said shares of stock in the said A. L. Haley Architect Company, did knowingly and fraudulently make oath and declare that the said stock was owned by the said M. B. Greenwood, and not by himself, and that he had given said stock to her prior to the institution of said bankruptcy proceedings; that said bankrupt had, with intent to conceal his financial condition, failed to keep books of account, or records from which such condition might be ascertained; and that said bankrupt has concealed, while a bankrupt, from his trustee, certain property belonging to his estate in bankruptcy, to wit: the said 1250 shares of the [4] capital stock of the A. L. Haley Architect Company which are not mentioned in his schedules filed in said bankruptcy proceedings.

These objections are made by John D. Pope, an objecting creditor of said bankrupt, and also are joined in by the Los Angeles Trust Company, the trustee herein.

There is some doubt whether a trustee in bankruptcy is a proper party to oppose a discharge, it being said that his duty under the act is to administer the estate and to attend merely to matters pertaining

thereto. But, it has been held in *In re Levey*, 13 A. B. R. 112, 133 Fed. 572, that the trustee may be competent, if the estate is still unsettled, which is the case here, but that the trustee must show how and why the trustee is a party in interest, which is not shown in these specifications.

At the inception of the hearing of this matter, and continuing throughout the hearing, and when the matter was submitted, the bankrupt opposed any consideration of the opposing creditor's objections on the ground that the opposing creditor had no interest in opposing the bankrupt's discharge, for the reason that the opposing creditor had not proved his claim, and could not prove his claim, because the year since the adjudication had expired, prior to the filing of any opposition to said bankrupt's discharge; and that by reason thereof the opposing creditor could not share as a claimant in any dividends of the bankrupt's estate, if any there were.

It was admitted that C. E. Fish recovered a judgment against the said bankrupt, A. L. Haley, in a certain action brought in the Superior Court of the State of California, in and for the County of Los Angeles, by C. E. Fish against the said A. L. Haley, for the sum of \$1054.66, and that said judgment, in the name of C. E. Fish as a creditor, was scheduled as a claim by the bankrupt, in his schedules filed herein on the [5] 17th day of June, 1909, and subject to its relevancy, it was agreed that the assignment made by Charles E. Fish to the said objecting creditor, John D. Pope, on April 28, 1906, of all the right and interest of the said C. E. Fish in and to

said judgment, should be received in evidence.

Subdivision b of section 14 of the Bankruptcy Act provides: "That the judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard * * *."

It is said in *Re Levey, supra*: "By implication, parties in interest only may oppose the discharge of the bankrupt. There is no express provision declaring who may oppose."

In General Order No. 32, made by the Supreme Court, it is provided that a creditor opposing application of a bankrupt for a discharge shall enter his appearance in opposition thereto, and shall file a specification in writing of the grounds of his opposition to the discharge.

Collier on Bankruptcy, page 262 (10th ed.), says: "Specifications may be filed by any person having a pecuniary interest in resisting the discharge of the bankrupt, as one owning an unliquidated claim, even though such person has not proven a debt, or his debt is no longer provable." Citing, *In re Conroy*, 14 A. B. R. 249.

Brandenburg, in his work on Bankruptcy, says, section 347: "Parties in interest, which would include creditors scheduled by the bankrupt, without regard to whether or not they had proved their claims, may oppose a discharge."

It is pointed out *In re Levey, supra*, that there is a clear distinction in reference to the allowance of the [6] opposition to a discharge by parties in

interest between "parties in interest" and "creditors," as the latter are mentioned in other parts of the Act.

The fact that the bankrupt has scheduled the person opposing his discharge, or the assignor of such opposing creditor, as a creditor, will imply that he is a party in interest, and the right to object is not restricted to creditors who have proved up their claims. The bankrupt here scheduled the assignor of this opposing creditor as a creditor, and the opposing creditor, as such assignee, may well be assumed to have an interest in resisting the discharge of the bankrupt from the debt he has against him, though he regarded the amount that he would probably receive from the estate as not sufficient to file and prove up his claim.

In re Frice, 2 A. B. R. 674.

It was held in *In re Jacob Nathanson*, 19 A. B. R. 56, 155 Fed. 645, that a creditor who has not proved his claim, cannot share in any distribution, but if he has a claim dischargeable in bankruptcy, and which could have been proved in the pending proceedings, he may oppose the discharge. It seems also that a person who has an enforceable claim against the bankrupt, as, for instance, a judgment from which the bankrupt would be relieved by his discharge, is a party in interest to defeat the bankrupt's discharge, and thus make it possible for him to subsequently enforce his claim.

I, therefore, have not sustained the bankrupt's objection to the consideration of the specifications and objections of the opposing creditor, John D. Pope, to

the bankrupt's discharge.

For the sake of convenience, I shall first recite the evidence in reference to the first and third specifications of objection of said creditor, John D. Pope, in opposition to [7] said bankrupt's discharge. The bankrupt was duly adjudicated as such on the 17th of June, 1909, and the order of reference was duly made to the undersigned as one of the referees in bankruptcy of this court, to take such further proceedings thereunder as are required by the Acts of Congress relating to Bankruptcy.

As appears by the records and files of this court, a meeting of the creditors of said bankrupt was duly called and held on the 13th day of July, 1909, before said referee, and at that meeting, the Los Angeles Trust Company was duly appointed trustee of said bankrupt's estate, and said bankrupt was examined at that meeting by the attorneys for the trustee in reference to his property. At that time, he testified in reference to his stock in the A. L. Haley Architect Company. The A. L. Haley Architect Company was a corporation organized under the laws of the state of California on the 16th of March, 1906, and to that company was transferred all of the business and goodwill of A. L. Haley, the bankrupt herein, and he received therefrom 1250 shares of stock for the goodwill of the business, and had the stock issued to one, Allen D. Butt, and had one share issued to himself. The other stockholders in the company were L. M. Lucas and A. Reef, they and the bankrupt each holding one share of stock in the company to qualify them as directors. The directors of the company were A.

L. Haley, L. M. Lucas and A. Reef. The bankrupt A. L. Haley was the president, L. M. Lucas was the secretary, and A. Reef was employed in the office as chief draughtsman.

The bankrupt testified that he had paid Mr. Butt about five hundred dollars and secured an assignment of the stock from Allen D. Butt, and that he then assigned the stock which still remained in the name of Allen D. Butt to Mrs. M. B. Greenwood. He was asked how Mrs. Greenwood happened to hold [8] the stock, and he said that it was held by her as security for a loan she had made him. He was asked whether it was his expectation that the stock should be returned to him in the event that the loan was paid, and he said it was his expectation, that if he paid the amount loaned, the sum of \$2,000.00, together with interest, and satisfied the obligation, that he would get the stock, and he also testified that if the money was paid to Mrs. Greenwood, he would be entitled to the stock, because it was his and she had it, but he did not know whether she would give it up or not.

At that time, he also testified that there had been no meetings of the stockholders of the A. L. Haley Architect Company; that he was authorized by resolution of the directors of the A. L. Haley Architect Company to transact all its business; that there had been no dividends paid on the stock; that he had drawn a salary of \$250.00 a month as an employee of the company, and in addition to that he had overdrawn his account and taken from the company, under the resolution authorizing him to do its busi-

ness a sum of upwards of ten thousand dollars; and that he was indebted to the company in that amount, and that none of the stockholders had ever called upon him for an accounting or asked him for money to apply upon dividends; that all of the money that had been received by the company for doing business as *a* architect, of which he was the architect, was received and handled by him, and paid out and disbursed by him.

He testified that his reason for drawing the money in preference to other people drawing it was due to the fact that he practically owned all the stock and that it was equivalent to declaring a dividend, but instead of declaring a dividend he simply got money from the secretary of the company whenever he wanted it. [9]

At this meeting, the bankrupt was not represented by counsel. At a subsequent meeting, after Mrs. Greenwood had been privately examined, the bankrupt testified that he had borrowed money from Mrs. Greenwood and pledged the 1250 shares with her, as security for the loan, and that subsequently she had called upon him for payment of the loan due her, and that he was unable to pay her the loan, and that he then gave her the stock, and that he was not able to decide whether the stock was hers or not.

This stock is not scheduled or mentioned in the schedules in bankruptcy, either as the property of the bankrupt or that he had any interest therein, and so far as the books of the A. L. Haley Architect Company show, it was stock that stood in the name of Allen D. Butt.

The bankrupt did not do any business himself after the orgination of the A. L. Haley Company, and all his business was done through that company. At the first hearing he did not testify that when the money fell due and the indebtedness was due, that he was unable to meet it or unable to pay it, and that he then gave the stock to Mrs. Greenwood. There is no mention of this transfer. At the later hearing, he stated that he did not know the law and did not pretend to say where the title would be according to law; but there was no such discussion at the first hearing. The bankrupt testified that at the time that he made out his schedules, he did not believe that he had any interest in the stock, and that at that time the stock had been forfeited for over a year.

It thus appears that the bankrupt has been enjoying property which rightfully and equitably belongs to his creditors. The bankrupt's property has always been under his own control. It does not do for him to say that he does not know whether the title is vested in him or in Mrs. Greenwood. [10] Whatever may have been his equity in the property at the time of the filing of the petition in bankruptcy, belonging evidently as the property did to the bankrupt, and used by him, it was his duty to schedule it as an asset. He could not truthfully swear that he had included all his property in his schedule and at the same time omit therefrom any mention of his interest in the 1250 shares of the A. L. Haley, Architect, Incorporated. There is no doubt about the fact that the bankrupt is an architect, and that he took up this scheme of converting his property and the good-

will of his business into a corporation known as the "A. L. Haley, Architect, Incorporated," so that it might not be within the reach of his creditors, and that he could enjoy the benefits of it without accounting therefor to anyone whomsoever. It is evident that from the inception of the corporation to the time of the filing of the petition in bankruptcy, the bankrupt was to enjoy the benefit of the corporation and of all its earnings. That he had transferred the property to Mrs. Greenwood as security for a debt, or as her absolute property, when he continued to enjoy all the benefits of it, is such an unusual and improbable story that the mere recital of it is convincing that the property is the property of the bankrupt, and that if Mrs. Greenwood holds it at all, she only holds it as security for some alleged indebtedness due her from the bankrupt.

Under these circumstances, for the bankrupt not to schedule the property and to continue to insist that the property is not his, is a concealment of property from his trustee which should bar his discharge.

The utter recklessness with which the bankrupt testified at one time in the filing of the schedules that he there scheduled all his property, and on his first examination testified that he was the owner of 1250 shares of stock of the [11] A. L. Haley, Architect Company, but that it was pledged as security to Mrs. Greenwood, and that he has enjoyed all the benefits and profits thereof, and that she has taken no part in the meetings of the company and never received any dividend, and then to testify on the second hearing that he had no interest in the property, and that

long before he had given it to Mrs. Greenwood to be hers absolutely, is such a flagrant disregard by the bankrupt of the obligations of his oath taken in this bankruptcy proceeding, that he must stand convicted so far as this record goes of having made a false oath, when he testified before the referee in bankruptcy, and that he did it wilfully, knowingly and fraudulently.

A disclosure of the whole truth in reference to this matter would have enabled the trustee to have recovered this property. It is no excuse that the bankrupt makes, that he did not know the law, or that he was not represented at the first meeting of creditors by an attorney to direct and guide him. He must have known all the facts with reference to these transactions. The essence of his offense is that he concealed property with intent to keep it from his creditors, and that he wilfully, knowingly and fraudulently made different statements in reference thereto while under oath.

That he is not entitled to a discharge under these circumstances and for these reasons is fully sustained by the authorities.

In re Quackenbush, 4 A. B. R. 274;

In re Guilbert, 22 A. B. R. 221-223;

In re Goodman, 22 A. B. R. 570. [12]

As to the second specification of opposition to discharge, that the bankrupt has, with intent to conceal his financial condition, failed to keep books of account or records from which such condition might be ascertained, in that the said bankrupt, prior to the institution of the bankruptcy proceedings was

in receipt of a large income from his business as architect and contractor, and that he kept no account of his receipts or disbursements, and kept no books showing that he had received and what he had done with the money, all with the intent to conceal his financial condition, this is charged in the language of the Act, and states all that is required in setting it forth. No further particulars could be given. *In re Ginsburg*, 12 A. B. R. 459. In the language of the act it charges a failure to keep books of account.

This is a fact, and no further particulars need be given. It is not necessary, as in other specifications setting forth opposition to the bankrupt's discharge, to state that this is an offense that is committed knowingly and fraudulently. It is not the charge of the commission of an offense prohibited by the Bankruptcy Act, but merely a statement of a fact as to the failure to keep books of account from which his financial condition might be ascertained, and with intent to conceal his financial condition.

The testimony in reference to this is without contradiction, that the bankrupt himself kept no books of account; that the A. L. Haley, Architect, Incorporated, kept books of account in which there was an account with the bankrupt charging him for the salary which he drew from the company, and also charging him with other moneys which he drew from the company from time to time. Of these moneys which were drawn from the A. L. Haley Architect Company by the bankrupt, no [13] account was kept. The bankrupt had no books or

records from which it could be ascertained what he had done with the large sums of money, amounting besides salary to over ten thousand dollars, which he had drawn from the A. L. Haley Architect Company. That he did not keep any such books of account or any records, and with the intent to conceal his true financial condition, is evident from the fact that he was being constantly harassed by creditors who on supplemental proceedings were endeavoring to find out his true financial condition, and notwithstanding that fact, he kept no books of account for their inspection. It was the constant harassing of him on supplemental proceedings that forced him into bankruptcy. This is not a case of the failure to keep proper books of account, but the failure to keep any books which will show what the bankrupt did with the money which he was continually receiving.

Taken in connection with the fact that the bankrupt was the principal factor in the corporation known as the A. L. Haley, Architect Company, that he did all the business just as he saw fit to do, and used all the money that came into that company without consulting any other of the stockholders of the company, and thereafter kept no account of the money, it must be held that the charge made in the second specification of objection, that he failed to keep books of account or records from which his financial condition might be ascertained, with intent to conceal his true financial condition, must be sustained.

It is claimed by the bankrupt that these objections

and specifications should not be sustained, because of the order that was made in the bankruptcy proceedings upon the petition of the trustee, filed July 28, 1908, for an order on Mrs. M. B. Greenwood to show cause why she should not surrender [14] the certificate for the 1250 shares of stock of the A. L. Haley Company, Incorporated, held by her, to the trustee as an asset of the estate of the bankrupt, and why she should not be restrained from disposing of said stock or encumbering or hypothecating the same, or why said bankrupt should not be declared to be the lawful owner of said stock, subject to the encumbrance which said bankrupt had placed upon said stock in favor of said Greenwood, and the order entered thereon on the 24th day of September, 1909, discharging the rule to show cause against Mrs. M. B. Greenwood.

This petition of the trustee set forth the incorporation of the A. L. Haley Architect Company and the issuance of certificate No. 4 of said company to Allen D. Butt for 1250 shares, and that subsequent to that time a memorandum was made upon the stub of such stock-book, indicating that said certificate was delivered to Mrs. M. B. Greenwood; that the bankrupt had previously testified that the said stock was owned by him, but that it was hypothecated by him as security to Mrs. Greenwood for two thousand dollars, and sets forth the interest of the said bankrupt in said stock as shown before the referee at the first hearing and examination of said bankrupt.

After a hearing on the rule to show cause entered upon said petition, an order was entered on the 24th

day of September, 1909, by the referee in charge of said proceeding as follows:

"This cause coming on to be heard, and the court having heard the evidence, the Court finds that there is not sufficient evidence to make a summary order upon Mrs. M. Greenwood to turn over the stock to the trustee, and without prejudice to the right of the trustee to bring any plenary action if it may see fit, it is ordered that the rule to [15] show cause may be discharged."

There is nothing in this order that is *res adjudicata* of the proceedings here. Neither the bankrupt nor this objecting creditor were parties to that proceeding, and it is evident from the order, that upon the showing made, Mrs. Greenwood claimed the property adversely to the trustee, and that the Court therefore was powerless to make a summary order upon her to deliver it to the trustee, and that that was all that was decided in that proceeding. It was not in any sense determinative of the matters and questions here involved.

As conclusions from the foregoing, I therefore report that the objections and the specifications of opposition to the said bankrupt's discharge and each of them should be sustained.

That said bankrupt is not entitled to his discharge, and that his application for a discharge should be denied.

Respectfully submitted,
LYNN HELM.

Expenses of Referee:

Reporter's fees.....	\$16.00
Master's fees.....

[Endorsed]: No. 347. In the United States District Court, Southern District of California, Southern Division. In the Matter of A. L. Haley, Bankrupt. Report of Special Master on Petition for Discharge and Opposition Thereto. Filed Feb. 23, 1911, at 9 o'clock A. M. Lynn Helm, Referee, Special Master.

Filed Feby. 23, 1911, at 20 min. past 10 o'clock A. M. E. H. Owen, Clerk. By _____, Deputy Clerk. Lynn Helm, 510 Los Angeles Trust Building, Los Angeles, Cal. [16]

In the District Court of the United States, Southern District of California, Southern Division.

No. 347.

In the Matter of A. L. HALEY,

Bankrupt.

Exceptions to Report of Special Master.

Now comes A. L. Haley, bankrupt, and files his exceptions to the report of Special Master Lynn Helm herein as follows, to wit:

1. He excepts to the finding that John D. Pope could object to the discharge of bankrupt, upon the ground that the said John D. Pope has not shown himself to be a party in interest, for the reason that he did not file his claim within one year after the adjudication of bankruptcy herein, nor had he at the time of the hearing filed any assignment of any claim of any kind or character, nor was he mentioned in the original proceedings as having any claim against

the said bankrupt, and upon the ground that he was not in any manner a party in interest as contemplated by the law relating to said matters.

2. He excepts to the finding of the Court as to the evidence upon the ground that it is not a correct finding as to the evidence, and upon the ground that he finds facts outside of the issues and that there was no evidence of any kind or character showing that the said corporation was a scheme for said bankrupt to escape his creditors or that he ever drew any dividends at all, and particularly the finding that the bankrupt was the owner of the stock instead of Mrs. Greenwood, as the evidence clearly showed that the stock had been transferred to Mrs. Greenwood to satisfy her claim against the stock long prior to the proceeding in bankruptcy, and that the said Haley had not concealed his property from his creditors [17] and that the said Haley never at any time concealed any fact or attempted to conceal any fact from his creditors in bankruptcy, but at all times, from the first meeting of the creditors, made a clean breast of the facts surrounding the transaction with Mrs. Greenwood relating to said stock, and related the facts as he understood them, and stated that it was impossible for him to decide the point of law as to whether there had been a legal transfer of the stock to Mrs. Greenwood or not, and upon the ground that the said Master in his first finding found that the bankrupt was correct in his statement and found that the said Mrs. Greenwood was the owner of the stock, and discharged the order of inquiry into said matter, and subsequently reverses himself in the

present finding; and upon the ground that if it is a matter in which the said Master finds it impossible to decide in the first instance whether the said Haley was the owner of said stock or not, that it is quite clear that the said bankrupt in being unable to so decide was not guilty of any fraud or deceit or false oath in said premises. And the said bankrupt excepts to the finding of the said Master that the testimony of the said bankrupt was utterly reckless, when the evidence shows that he told a plain, simple, unvarnished story relating to the said transaction, not uttered recklessly, carelessly or falsely, but based upon the facts as he understood them. And excepts to the finding that his testimony was such a flagrant disregard of the obligations of his oath, that he must stand convicted by the said Master of having made a false oath when he testified before the Referee in Bankruptcy, or that he did it wilfully or falsely. And upon the further ground that the said question was a complicated question of law and one which the said Master first, as Referee, decided in favor of the bankrupt, and subsequently reversed himself and found against the said bankrupt. And upon the further ground that at said final hearing there was no evidence offered at all by the said contestant John [18] D. Pope, the latter not being present at said hearing or giving any testimony therein, and that all the testimony that was given at said final hearing was given by the trustee therein who, under the law is supposed to be impartial in said proceedings, and by the attorney for the trustee, and not by the said contestant.

3. The said bankrupt further excepts to the finding that he failed to keep books of account owing to supplemental proceedings or harassing creditors, to conceal from them his true financial condition, and particularly upon the ground that the said bankrupt had never at any time kept books of his personal accounts or individual accounts, for the reason that he was not in business personally but was an employee of a corporation upon a salary, and that he fully and completely accounted for his entire income and all of his assets.

4. And he excepts to the finding that the order to show cause regarding Mrs. Greenwood was not *res adjudicata* of matters here involved, and that he is not entitled to a discharge, and particularly upon the ground that at the time the said Referee found in regard to the ownership of the stock and found that the same was the property of Mrs. Greenwood that the evidence then was fresh in the mind of the said Referee and that after a lapse of a long period of time and without further evidence upon that point the said Referee, without good reason or cause, as the said bankrupt believes and therefore files his objections and exceptions, without additional evidence sufficient to sustain said finding.

5. And the said bankrupt excepts to each and every finding of the said Master upon the ground that the same is contrary to law and not supported by the evidence.

Wherefore, he asks that this Honorable Court hear each and all of the issues involved in this matter at as early a date as is convenient to the said court; and

he particularly prays that [19] the said Court shall set aside the findings and report of the said Master, and grant him a discharge in bankruptcy.

A. L. HALEY,
Bankrupt.

R. L. HORTON,
Attorney for Bankrupt.

[Notarial]

State of California,
County of Los Angeles,—ss.

A. L. Haley, being by me first duly sworn, deposes and says: That he is the bankrupt in the above-entitled matter; that he has heard read the foregoing exceptions and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein states upon—— information or belief, and as to those matters that he believes it to be true.

[Notarial Seal] A. L. HALEY.

Subscribed and sworn to before me this 25th day of February, 1911.

[Seal] R. L. HORTON,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 347. In the District Court of the United States, Southern District of California, Southern Division. In the Matter of A. L. Haley, Bankrupt. Exceptions to Report of Special Master. Filed Feb. 25, 1911, at 15 min. past 3 o'clock P. M. E. H. Owen, Clerk. C. E. Scott, Deputy.

Received copy of the within —— this —— day of ——, 191—, Attorney for ——. R. L. Horton, Rooms 210–211, Henne Block, Telephones: Main 822, Home A9102, 122 W. Third Street, Los Angeles, California, Attorney for Bankrupt. [20]

[Order Denying Exceptions to Report of Special Master and Affirming Said Report.]

At a stated Term, to wit, the January Term, A. D. 1911, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the 24th day of April, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable OLIN WELLBORN, District Judge.

No. 347—Bkcy. S. D.

In re HALEY,
Bankrupt.

This matter coming on this day to be heard on exceptions to the report of the Special Master herein; R. L. Horton, Esq., appearing as counsel for the bankrupt, and Messrs. Shankland & Chandler appearing as counsel for creditors; and said exceptions to the report of Special Master having been argued by R. L. Horton, Esq., of counsel for the bankrupt, by J. P. Chandler, Esq., of counsel for creditors, and by R. L. Horton, Esq., of counsel for bankrupt in reply; and said exceptions having been submitted to the Court for its consideration and decision, and

the Court having duly considered the same and being fully advised in the premises, it is ordered that said exceptions be, and the same hereby are denied, and that said report of the Special Master herein be, and the same hereby is affirmed. [21]

In the District Court of the United States, Southern District of California, Southern Division.

No. 347.

In the Matter of A. L. HALEY,

Bankrupt.

Petition to Revise in Matter of Law.

To the Honorable Judges of the *Circuit of Appeals of the Circuit of the United States:*

Your petitioner respectfully shows, that he resides at Los Angeles, California, and is a bankrupt, who was so adjudged by the District Court of the United States, in and for the Southern District of California, on the 17th day of June, 1909.

That after such adjudication the following proceedings were had in the case of the said bankrupt:

That the estate of said bankrupt was duly and regularly administered upon, and on the 11th day of November, 1909, the said bankrupt petitioned the above court for his discharge and the same was set for the 17th day of December, A. D. 1909, for hearing. Thereafter, on the 30th day of December, 1909, objections to the discharge of said bankrupt were filed by one John D. Pope, which objections and answer thereto are hereto attached and marked Exhibit

“A,” and made a part of this application. Thereafter, said matters as to the discharge of said bankrupt was referred to Special Master Lynn Helm, Esq., to ascertain and report the facts and his opinion, which said report was, on the 13th day of February, 1911, filed in the above court recommending that the objections be sustained and said discharge denied. Thereafter, said matter was heard by the above Honorable Court, and on the 8th day of May, 1911, an order was granted and entered by said District Court of the United States sustaining and confirming the report of such Special Master and sustaining the objections of said Pope and denying the application [22] for discharge of the said bankrupt, which said order is hereto attached and marked Exhibit “B” and made a part of this application.

That said order was erroneous in the matters of law in the following particulars:

1. In sustaining the finding that John D. Pope could object to the discharge of said bankrupt, upon the ground that he failed to show himself a party in interest as required by law.
2. In sustaining said report that the said bankrupt concealed his property or, any part or portion thereof.
3. In confirming the finding of the said Master that the bankrupt has been guilty of having made false oath.
4. In confirming the report of the said Master that he failed to keep books of account.
5. In denying the application for the discharge of the said bankrupt.

6. In allowing the said John D. Pope costs.

Wherefore, your petitioner feeling aggrieved because of such order, asks that the same may be revised in matter of law by your Honorable Court as provided in section 24-B of the Bankruptcy Law and the rules and practices in such case provided.

A. L. HALEY,
Petitioner.

By R. L. HORTON,
Attorney for Petitioner. [23]

Exhibit "A."

*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of A. L. HALEY,
Bankrupt.

Objections to Discharge of Bankrupt.

John D. Pope, of Los Angeles, County of Los Angeles, State of California, a party interested in the estate of said A. L. Haley, Bankrupt, whose claim will be released by a discharge of the bankrupt and whose claim is as follows, being an assignment made by Charles E. Fish to said John D. Pope on April 28, 1906, of all the right of said Charles E. Fish in and to that certain judgment obtained in the case of Charles E. Fish vs. Arthur L. Haley in the Superior Court of the County of Los Angeles for One Thousand Fifty-three and Sixty-six Hundredths (\$1,053.66) Dollars and cost, said judgment being scheduled by A. L. Haley in the name of Charles E. Fish and Los Angeles Trust Company, the Trustee herein do hereby oppose the granting to him of the discharge

from his debts, and for the grounds of such opposition, do file the following specifications:

The estate is still being administered and is not closed.

First. The said Bankrupt made a false oath in relation to the proceeding in *bankrupt*, in that, during the examination of said bankrupt in the course of the bankruptcy proceedings in the estate of A. L. Haley, bankrupt, before the Honorable Lynn Helm, Referee in Bankruptcy, having jurisdiction thereof, in the City of Los Angeles, the said Bankrupt being first duly sworn, and being interrogated in relation to the ownership of certain of the capital stock in the A. L. Haley Architect Company, a corporation, which said stock was of great value, the said bankrupt testified that he was the owner of twelve hundred and fifty (1,250) shares of the capital stock of said company, and that said stock was pledged with Mrs. M. B. Greenwood as security for an indebtedness which he owed to the said M. B. Greenwood; and subsequently the said bankrupt, during an examination of said bankrupt in the estate of A. L. Haley, bankrupt, before the Honorable Lynn Helm, Referee in Bankruptcy, having jurisdiction thereof, in the City of Los Angeles, the said bankrupt being first duly sworn, and being interrogated in relation to the ownership of the said stock hereinabove mentioned in the said A. L. Haley Architect Company, did knowingly and fraudulently make oath and declare that the aforesaid stock was owned by said M. B. Greenwood, and not owned by himself, and that he had given said stock to her prior to the institution

of the bankruptcy proceedings.

Second. That said bankrupt, has, with intent to conceal his financial condition, failed to keep books of account, or of records, from which such condition might be ascertained, in that the said A. L. Haley, bankrupt, prior to the institution of bankruptcy proceedings, was in receipt of a large income from his business as architect and contractor, and that he kept no account of his receipts or disbursements, and kept no books showing what he had received, or what he had done with the money, all with intent to conceal his financial condition. [24]

Third. That the said bankrupt has concealed, while a bankrupt, from his trustee certain property belonging to his estate in bankruptcy, in that the said bankrupt has knowingly and fraudulently concealed from said trustee his ownership of twelve hundred and fifty (1,250) shares of the capital stock of the A. L. Haley Architect Company, which said stock is of great value, and has knowingly and fraudulently failed to schedule said stock in his schedule filed herein, said stock standing in the name of Allen D. Budd on the books of the company and the certificate thereof is in the possession of M. B. Greenwood.

JOHN D. POPE,

Creditor.

LOS ANGELES TRUST CO.,

Trustee.

By L. S. CHANDLER,

Trust Officer.

SHANKLAND & CHANDLER,

Attorneys for Creditor and Trustee. [25]

*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of A. L. HALEY,

Bankrupt.

Answer of Bankrupt to Objections.

Now comes A. L. Haley, bankrupt, and in answer to objections of John D. Pope, denies and alleges as follows:

First. Denies that he made a false oath in relation to the proceeding in bankruptcy in that during the examination of said bankrupt in the course of the bankruptcy proceedings in the estate of said bankrupt before the Honorable Lynn Helm, Referee in Bankruptcy, in relation to the ownership of certain of the capital stock in the A. L. Haley Architect Company, a corporation, or at all, or that said stock was of great value, and denies that he testified falsely in any particular during said proceedings, but alleges that he testified at one time he owned said shares of stock referred to, but subsequently pledged the same to the said Mrs. Greenwood as security for an indebtedness, and that he was unable to pay said indebtedness, and that he thereafter, upon his failure to and inability to redeem said stock, informed the said Greenwood that she could keep, have and retain said stock for said indebtedness, and he informed the said Honorable Lynn Helm that he was unable to say whether said transaction amounted to a sale or assignment of the stock or not, or whether the said Greenwood still held the same as security for the original loan.

Second. He denies that he has with intent to conceal his financial condition, failed to keep books of account or records from which said condition might be ascertained, and denies that prior to the institution of said bankruptcy proceedings he was in [26] the receipt of a large income from his business as architect or contractor, or at all, except a sufficient income to pay his living expenses. And he further alleges that he has never at any time kept a book of personal accounts of receipts and disbursements on account of his personal income and disbursements, but alleges that after paying his living expenses that he had no surplus of funds of any kind or character, and that there was no occasion or necessity for the said bankrupt to keep books of personal receipts and expenditures.

Third. Denies that said bankrupt has concealed, while a bankrupt, from his trustee certain or any property belonging to his said estate in bankruptcy, or that he has fraudulently or knowingly concealed from said trustee his ownership of twelve hundred and fifty (1,250) shares, or any shares, of the capital stock of the said A. L. Haley Architect Company, or that said stock is of great value, or that he has knowingly or fraudulently failed to schedule any property belonging to himself or any property of any kind or character that he believed he had any interest in whatsoever, but alleges that he truthfully and honestly made a report of all of his assets in said proceeding and turned over to his trustee all of his assets and property of each and every kind in which he had any interest whatsoever.

Fourth. That on the 24th day of September, 1909, at two o'clock P. M. of that day, the said matters and issues herein contained and involved were duly and regularly heard and tried before the said Honorable Lynn Helm, Referee in Bankruptcy, and a number of witnesses examined, and thereafter and on said date the said referee in bankruptcy duly and regularly made and entered an order therein in favor of the said bankrupt, and holding and deciding in said matters that the bankrupt was not guilty of the matters herein charged and set forth, and that said order has not been vacated or set aside, but still remains in force and [27] effect, as duly given and made by the said referee as above alleged.

Wherefore, the said bankrupt asks that said objections be denied and that he be granted his discharge.

R. L. HORTON,
Attorney for Said Bankrupt.

State of California,
County of Los Angeles,—ss.

A. L. Haley, being by me first duly sworn, deposes and says: That he is the bankrupt in the above-entitled action; that he has read the foregoing Answer of Bankrupt to Objections and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

A. L. HALEY.

Subscribed and sworn to before me this 21 day of January, 1910.

R. L. HORTON,

Notary Public in and for Los Angeles County, State of California. [28]

In the District Court of the United States for the Southern District of California.

No. 347—IN BANKRUPTCY.

In the Matter of A. L. HALEY,

Bankrupt.

Amendment to Answer of Bankrupt.

After the word "Follow," page one, line 11, insert the following:

a. Denies that the said John D. Pope is a party interested in the estate of A. L. Haley, bankrupt, or that he has any claim against said estate whatever or any interest in said estate whatever, but alleges that more than one year has elapsed since said bankrupt was adjudged a bankrupt by the above court, to wit, on the 17th day of June, 1909, and alleges that the said John D. Pope has not filed any claim against said estate and the period of time to file said claim or any claim against the estate of said bankrupt has expired, and the said bankrupt alleges that the right of the said John D. Pope to file a claim in said estate has expired by the provisions of section 57, subdivision N of the Bankruptcy Act now in force and relating to said proceeding.

R. L. HORTON,

Attorney for said Bankrupt. [29]

Exhibit "B."

In the District Court of the United States, Southern District of California, Southern Division.

ORDER DENYING DISCHARGE.

In the Matter of the Estate of A. L. HALEY,
Bankrupt.

[**Order Confirming Report of Special Master, Sustaining Specifications of Objections of John D. Pope, Denying Application for Discharge of Bankrupt, etc.]**

Application having been made by A. L. Haley, Bankrupt, for a discharge herein, and specifications of objections having been filed thereto by John D. Pope, a creditor, and a party interested, and such specifications having been referred to Lynn Helm, Esquire, as special master, to ascertain and report the facts with his opinion, and such special master having filed his report on the 13th day of February, 1911, and recommending that such specifications be sustained, and exceptions to such report having been duly filed by said bankrupt and the same having been argued, and, after hearing J. P. Chandler, Esquire, attorney for the objecting creditor, on the motion, and R. L. Horton, Esquire, attorney for the bankrupt, in opposition thereto:

NOW, THEREFORE, on motion of J. P. Chandler, attorney for the objecting creditor, IT IS ORDERED that the report of such special master be and it is hereby in all respects confirmed.

That the specifications of objections of John D.

Pope, a creditor and party interested, be and the same are hereby sustained.

That the application for discharge of the said A. L. Haley, Bankrupt, be and the same is hereby denied.

And that the said objecting creditor, John D. Pope, be allowed his costs herein, hereafter to be taxed by this court.

OLIN WELLBORN,
District Judge.

[Endorsed]: Original. No. 347. In the District Court of the United States, Southern District of California, Southern Division. In the Matter of A. L. Haley, Bankrupt. Petition to Revise in the Matter of Law. Received a copy of the within this 17th day of May, 1911. Shankland & Chandler, Attorneys for John D. Pope.

Filed May 17, 1911, at 35 min. past 4 o'clock P. M. E. H. Owen, Clerk. C. E. Scott, Deputy. R. L. Horton, Attorney at Law, Rooms 210-211 Henne Building. Telephones: Main 822, Home A5102, 122 W. Third Street, Los Angeles, California. [30]

In the District Court of the United States, Southern District of California, Southern Division.

No. 347.

In the Matter of A. L. HALEY,

Bankrupt.

Order Allowing Petition for Revision.

WHEREAS, application has been made for revision in matter of law by the *Circuit of Appeals* of the

Ninth Circuit of the United States of the order entered herein on the 8th day of May, 1911, and the Court being satisfied that the question there determined is one of which revision may be asked as provided in section 24b of the Bankruptcy Law, and that the application should be granted; on motion of R. L. Horton, Esq., Attorney for petitioner, IT IS ORDERED that the order of this Court made and entered herein on the 8th day of May, 1911, be revised in matter of law, in the Circuit Court of Appeals, Ninth Circuit, of the United States, as provided by section 24b *and* the Bankruptcy Law and the rules and practice of this Court.

That the clerk within thirty days of this date prepare, at the expense of the petitioner, a certified copy of such order and of the record of this case pertinent to such order, and file the same with the clerk of such Circuit Court of Appeals.

Witness the Honorable OLIN WELLBORN, Judge of the said court and the seal thereof at the city of Los Angeles, in said district, on the 17th day of May, 1911.

OLIN WELLBORN,
Judge.

[Endorsed]: Original. No. 347. In the District Court of the United States, Southern District of California, Southern Division. In the Matter of A. L. Haley, Bankrupt. Order Allowing Petition for Revision. Filed May 17, 1911, at 55 min. past 4 o'clock P. M. E. H. Owen, Clerk. C. E. Scott, Deputy. R. L. Horton, Attorney at Law, Rooms 210-211 Henne Building. Telephones: Main 822,

Home A5102, 122 W. Third Street, Los Angeles, California. [31]

In the District Court of the United States, Southern District of California, Southern Division.

No. 347.

In the Matter of A. L. HALEY,

Bankrupt.

Notice of Filing Petition for Review.

To Messrs. Shankland & Chandler, Attorneys for John D. Pope, Objector, and Trustee of the Estate of said Bankrupt:

You are hereby notified that that certain petition for review, a copy of which was duly served on you on the 17th day of May, 1911, was on said date duly presented to the Honorable Olin Wellborn, Judge of the above court, for allowance, and an order made by the said Judge allowing said petition for review in matters of law, and that the same has been filed with the clerk of the above court, with instructions to prepare the necessary transcript of record in said matter.

R. L. HORTON,
Attorney for said Bankrupt.

Dated May 18, 1911.

[Endorsed]: Original. No. 347. In the District Court of the United States, Southern District of California, Southern Division. In the Matter of A. L. Haley, Bankrupt. Notice of Filing Petition for Review.

Received a copy of the within notice this 18th day of May, 1911.

SHANKLAND & CHANDLER,
Attorneys for John D. Pope, and the Trustee of the
Estate of said Bankrupt.

Filed May 18, 1911, at 40 min. past 3 o'clock P. M.
E. H. Owen, Clerk. C. E. Scott, Deputy. R. L. Horton,
Attorney at Law, Rooms 210-211 Henne Building.
Telephones: Main 822, Home A5102, 122 W.
Third Street, Los Angeles, California, Atty. for
Bankrupt. [32]

[Assignment of Judgment.]

*In the Superior Court of the State of California, in
and for the County of Los Angeles.*

No. 47,748—Dept. 6.

CHARLES E. FISH,

Plaintiff,

vs.

ARTHUR L. HALEY,

Defendant,

and

COLLINS HOTEL COMPANY (a Corporation),

JOHN D. POPE and J. W. EDDY,

Defendants in Cross-complaint.

For value received I hereby sell, assign and transfer to John D. Pope the judgment for Ten Hundred and Fifty-three and 66/100 Dollars (\$1053.66) and costs, rendered October 20th, 1905, in my favor in said action, and authorize said Pope, at his own cost

and expense, to take any action that may be deemed necessary to enforce the payment of said judgment.

CHARLES E. FISH.

Dated April 28th, 1906.

[Endorsed]: No. 47,748. Dept. 6. In the Superior Court of Los Angeles County, California. Charles E. Fish, Plaintiff, vs. Arthur L. Haley et al., Defendants. Assignment of Judgment. Received copy of within _____ day of _____, 190_____. _____, Attorney for _____. John D. Pope, Stimson Building, Los Angeles, California, Attorney for Plaintiff. Filed Feb. 20, 1911, at 2 o'clock P. M. Lynn Helm, Referee.

Filed in the office of the Referee in Bankruptcy, in case No. 347, this 20 day of February, at 2 o'clock P. M., and withdrawn on substituting a true copy on the 21 day of February, 1911. Lynn Helm, Referee in Bankruptcy, Los Angeles County, Southern District of California. By _____. [33]

Certificate of Clerk U. S. District Court to Record.

I, E. H. Owen, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the originals: "Report of Special Master on Petition of Bankrupt for Discharge and upon the Specifications of Opposition thereto of John D. Pope, a creditor," "Exceptions to Report of Special Master," "Order Affirming Report of Special Master," "Petition to Revise in Matter of Law," "Order Allowing Petition

for Revision," "Notice of Filing Petition for Review," "Assignment of Judgment in Case of Fish vs. Haley to John D. Pope," "Names of Attorneys," and "Certificate of Clerk to Record," as made pursuant to praecipe of R. L. Horton, Esq., attorney for bankrupt and appellant.

In witness I have hereunto set my hand and affixed the seal of said Court, this 3d day of June, A. D. 1911.

[Seal] E. H. OWEN,
Clerk U. S. District Court for the Southern District
of California. [34]

[Endorsed]: No. 1997. United States Circuit Court of Appeals for the Ninth Circuit. A. L. Haley, Petitioner, vs. John D. Pope, Respondent. In the Matter of A. L. Haley, Bankrupt. Petition for Revision under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Southern District of California, Southern Division.

Filed June 12, 1911.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

A. L. Haley,

Petitioner,

vs.

John D. Pope,

Respondent.

In the Matter of

A. L. HALEY,

Bankrupt.

PETITIONER'S BRIEF.

STATEMENT OF THE CASE.

The petitioner was duly adjudicated a bankrupt on the 17th day of June, 1909, and an order of reference was duly made to Honorable Lynn Helm, referee in bankruptcy, to take such further proceedings thereunder as are required by the acts of Congress relating to bankruptcy. A trustee of the bankrupt's estate was duly appointed. On July 28, 1909, a petition by the trustee was filed for an order on Mrs. M. B. Greenwood to show cause why she should not surrender a certain certificate

for 1250 shares of stock in the A. L. Haley Company, Incorporated, claimed to be owned by her, to the trustee as an asset of the estate of the bankrupt, and why said bankrupt should not be declared to be the lawful owner of said stock subject to an incumbrance of \$2,000.00 which said bankrupt had placed upon said stock in favor of said Greenwood. On the 24th day of September, 1909, an order was entered by the said referee discharging the rule to show cause against Mrs. M. B. Greenwood, said referee making the following finding:

“The court finds that there is not sufficient evidence to ‘make a summary order upon Mrs. M. Greenwood to “turn over the stock to the trustee.”’

That thereafter on the 18th day of November, 1909, the bankrupt filed his petition for a discharge, and thereafter on the 29th day of December, 1909, respondent filed objections to said discharge of said bankrupt, and on the 25th day of June, 1910, the matter was referred to Hon. Lynn Helm as special master. The said special master on the 20th day of February, 1911, prepared his report holding the bankrupt not entitled to his discharge. The said respondent as such objector filed no claim in the estate of said bankrupt and filed no claim of any kind before the special master at said hearing, but on the 21st day of February, 1911, filed a true copy of an assignment of a certain judgment in the case of Charles E. Fish v. Arthur L. Haley. Charles E. Fish was scheduled as a creditor in the original schedule of the bankrupt filed on the 17th day of June, 1909, but neither said Fish nor the said respondent ever filed any claim in said bankruptcy proceedings.

These matters each and all appear in the transcript of the record, and the said bankrupt's petition for revision attacks the sufficiency in law of the said master's report, and contends that the facts set forth therein show that he was entitled to his discharge. Special references to said record will be pointed out by proper page references in this brief.

Specification of Errors and Argument Thereon.

The petition to revise in matter of law is set forth at page 23 of the transcript of the record in this case, and the particulars in which it is claimed that the order of the lower court is erroneous in matters of law is set forth on page 24. We will discuss these alleged errors in order.

Error 1: In sustaining the finding of the master that John D. Pope could object to the discharge of said bankrupt. This error is assigned upon the ground that the said John D. Pope failed to show himself a party in interest as required by law. This matter is discussed in the report of the special master at page 3 *et seq.* The objections it seems were joined in by the trustee in bankruptcy, but the special master decides against the trustee on page 4 in the following language:

"The trustee must show how and why the trustee is a "party in interest, which is not shown in these specifications."

Therefore, our discussion will be confined to the want of interest of the said John D. Pope. On page 4 the special master recites the fact that the bankrupt at all times during this proceeding

"opposed any consideration of the opposing creditor's
"objections on the ground that the opposing creditor had
"no interest in opposing the bankrupt's discharge, for
"the reason that the opposing creditor had not proved
"his claim, and could not prove his claim, because the
"year since the adjudication had expired, prior to the
"filing of any opposition to said bankrupt's discharge;
"and that by reason thereof the opposing creditor could
"not share in any dividends in the bankrupt's estate, if
"any there were."

The master's report continues:

"Subject to its relevancy, it was agreed that the as-
"signment made by Charles E. Fish to the said objecting
"creditor, John D. Pope, on April 28, 1906, of all the
"right and interest of the said C. E. Fish in and to said
"judgment, should be received in evidence."

But the said assignment, as appears from the record, was not offered or received in evidence at said hearing, nor had said assignment been filed at the time the said special master prepared his report upon said reference. This appears on pages 1 and 2 of the record, wherein it is recited that the matter was referred to the special master on the 25th of January, 1910, upon the petition of said bankrupt for a discharge, filed November 18th, 1909, and the objections of John D. Pope to said discharge of said bankrupt, filed December 29, 1909, and that the same was continued until the second day of November, 1911 (the latter would appear to be error and should be 1910) and thereafter:

"the testimony taken upon said hearing was to be writ-
"ten up and was not furnished to me until this day,
"February 20th, 1911."

Thus it would seem from the master's report that this matter was decided by him on the 20th day of February, 1911. On page 36 of the transcript appears the assignment of judgment and on page 37 it appears that a true copy of said assignment was not filed with said master until the 21st day of February, 1911.

Thus the record shows:

- a. That John D. Pope never at any time filed any claim of any kind or character in said bankruptcy proceedings;
- b. That from the date of his objections to the discharge of said bankrupt, filed November 18th, 1909, up to and including the date of the decision upon said matters by the special master, February 20th, 1911, he had filed no claim of any kind or character, or in any manner shown that he was a party in interest, nor had he filed in said proceedings any assignment of said judgment, but that the same was filed after said hearing had been had before the said referee and after the said referee had had the matter under submission for more than three and one-half months, and had finally reached a decision in said matter and prepared his report, which the record shows was prepared on the 20th of February, 1911. These facts appear from the transcript on pages 1 and 2 and 37.
- c. If the court shall hold that the filing had on the 21st day of February, 1911, of a true copy of said assignment was sufficient to entitle said assignment to be considered as evidence upon said hearing, then the same was subject to the objection of the bankrupt that the same was incompetent, irrelevant and immaterial.

The court will consider the long time that elapsed from the filing by the bankrupt of his schedules on the 17th day of June, 1909 [see transcript at bottom of page 4], and the filing of this assignment of judgment, which in itself is in no sense a claim against the estate, made on the 21st day of February, 1911, a lapse of nearly two years, and subsequent to the hearing in question and subsequent to the date of the decision of the special master. The alleged claim of the respondent, if it had any force or effect in the matter whatsoever, was stale. The law requires that the claim shall be filed within a period of one year from the date of the adjudication. The respondent's assignor never filed any claim of any kind or character, nor has the respondent. Thus the record shows that at no time during the hearing before the special master had the respondent offered any evidence of any interest of any kind or character in the estate of the bankrupt, either substantial or contingent. No paper of any kind filed subsequent to the hearing can have the effect of relating back to the date of the hearing, for the law contemplates that it must be first shown that the party opposing is a party in interest. This he must show as a foundation for his right to offer proofs in opposition to the discharge of the bankrupt. This, we think, clearly appears from the language of the statute itself, section 14, sub. b of the Bankruptcy Act, the language of which as to this matter is as follows:

“The judge shall hear the application for a discharge, “and such proofs and pleas as may be made in opposition thereto by parties in interest.”

In 94 Fed. Rep. 638 it is held:

“Before granting an order for the examination of a

“bankrupt the referee should be satisfied that the party “applying for the order is in fact a creditor of the bankrupt.”

Section 2459 Remington on Bankruptcy provides:

“Any party in interest, and only such, may oppose the bankrupt’s discharge.”

Section 2460 *id.* provides:

“Within the purview of this provision he must have a pecuniary interest.”

In re Levy, 13 A. B. R. 314, 133 Fed. 572.

Section 2467 of Remington declares that the law is liberal towards the bankrupt as to his discharge, and that there should be a strict construction in his favor.

“The act is very liberal towards the bankrupt as to his discharge, and strict construction of the terms under which opposition will be sustained, are had in favor of the bankrupt’s discharge.”

“Creditors who have not filed their claims are not parties to the proceeding and cannot participate in the proceedings in bankruptcy.”

In re Ogles (D. C. Tenn. 2 A. B. R. 514).

“The term ‘parties in interest’ as used in sections 57d and 57c, means those who have an interest in the *res* which is to be administered and distributed in the bankruptcy proceedings.”

Matter of Sully & Co. (C. C. A. 2d Cir.), Vol. 18, A. B. R. 125.

A similar provision of the law has been construed by our supreme courts. The expression occurs in section 1307 of the Code of Civil Procedure, as follows:

“Any person interested may appear and contest the “will.””

It has been decided under this section that the contestant must make this preliminary proof before he has any standing in court.

“To maintain a contest at all (contestant) must prove “at the outset that he has an interest in the estate.””

Estate of Latour, 140 Cal. 414;

Frank v. Shipley, 22 Ore. 104;

Estate of Hickman, 140 Cal. 609;

State v. Superior Court, 148 Cal. 55.

Even giving the rule the most liberal construction it could hardly be held that the filing of the assignment of judgment so long after the hearing and even after the decision of the special master upon the point, was a sufficient or any compliance with the provisions of law in this particular.

Error 2: It was error to sustain the report of the special master to the effect that the bankrupt concealed his property or any part or portion thereof.

We search in vain the master’s report for any conclusion or finding upon this matter that would bring the bankrupt under the penalty laid down in section 14 of the Bankruptcy Act or subdivision b of said section which covers the question in point. This provision of the law requires that the bankrupt shall have knowingly and fraudulently concealed while a bankrupt or after his discharge, from his trustee, any of the property belonging to his estate. The evidence upon this point is given in full in the master’s report at page 7 *et seq.* of the

transcript of the record, and it is in brief, that 1250 shares of stock in the A. L. Haley Company was originally issued to Allen D. Butt; that Mr. Butt thereafter, upon consideration, assigned the stock to one Mrs. Greenwood; the latter held the stock as security for a loan of two thousand dollars she had made to the bankrupt; that subsequently Mrs. Greenwood called upon the bankrupt for payment of the loan due her; that he was unable to pay her the loan and that he gave her the stock and that he was not able to decide whether the stock was hers or not. This stock was not scheduled. At page 10 of the record and as a part of the master's report, is the following:

“The bankrupt testified that at the time he made “out his schedules he did not believe he had any interest “in the stock, and at that time the stock had been for-“feited for over a year.”

Thus there is nothing in the facts recited by the master to show that the bankrupt knowingly and fraudulently concealed, while a bankrupt, from his trustee any of the property belonging to his estate. According to the master's report the stock had been transferred to Mrs. Greenwood as security for a loan of two thousand dollars; that upon failure of the bankrupt to meet the loan the stock was transferred to her absolutely, as a liquidation of the indebtedness, and this had all been done over a year before the bankruptcy proceedings, and at that time “the “bankrupt did not believe that he had any interest in the “stock.” [Tr. p. 10.] There was no intentional concealment and certainly there was no fraud. The facts recited in the master's report clearly and conclusively show

this. It shows that the stock had been forfeited for more than a year prior to the filing of the petition in bankruptcy. [Tr. p. 10.]

“There must be clear proof of the ownership in fact “by the bankrupt of the property in question, and clear “knowledge of such fact on his part, to bring the matter “within the provisions of this section.”

Fellows v. Frendenhall, 102 Fed. 731.

“Failure to schedule or surrender property to trustee “is not *per se* or *ipso facto* to intentionally or fraudulently “conceal it.”

In re Hirsch, 96 Fed. Rep. 468.

“The omission to include property in the schedule of “assets filed by the bankrupt, when such omission was “due to a mistake either of law or fact, is not an offense “under subdivision b of section 29 of the Bankruptcy “Act, and is not ground for withholding a discharge.”

In re Morrow, 96 Fed. Rep. 574.

“Where schedules purport to give a full, true and correct schedule of the assets and liabilities and a creditor “alleges that they do not do so, the allegations should be “definite and certain, and general averments are not sufficient.”

In re Stead, 107 Fed. Rep. 68.

Error 3: In confirming the finding of the said special master that the bankrupt has been guilty of having made a false oath, error was committed. All of these various findings of the master have been evolved out of the stock transaction above referred to, and what has been said in

regard to the concealment of property applies equally to the charge that the bankrupt has been guilty of a false oath. The report shows (page 10) that the bankrupt "did not believe that he had any interest in the stock," and how it is possible that the master could find that he was guilty of a false oath under the circumstances is difficult to understand. In this connection we desire to refer to the facts as set forth in the master's report, that this very question had been determined upon a former hearing before the special master acting as referee, at which time the referee inquired fully into the matter as shown in the master's report (pages 15 and 16), and at that time made the following finding which is set out in the master's report:

"This cause coming on to be heard and the court having heard the evidence, the court finds that there is not sufficient evidence to make a summary order upon Mrs. Greenwood to turn over the stock to the trustee, and without prejudice to the right of the trustee to bring any plenary action if it may see fit, it is ordered that the rule to show cause may be discharged." [Tr. p. 16.]

If this Honorable Court will read the facts as set forth in the master's report, it will see that the question as to the ownership of this stock was one of law and one which the master first as referee decided in favor of the bankrupt, and subsequently as master reversed himself and found against the bankrupt. [See Tr. pp. 15 and 16.] We contend that this finding was *res adjudicata* of that question in so far as these proceedings are concerned, but whether it was such or not, the bankrupt certainly cannot be convicted of having made a false oath upon

matters the referee himself, after a most thorough investigation into the facts, decided in favor of the bankrupt. If the bankrupt made any honest mistake in his testimony either in law or fact, it is not an offense under the Bankruptcy Act.

In re Morrow, 97 Fed. Rep. 574.

“Any statement made or oath made relating to property must have been intentionally and fraudulently ‘made, and not made under a mistake, in order to render ‘the oath a false oath.’”

In re Eaton, 110 Fed. Rep. 731;

Smith v. Keagen, 111 Fed. Rep. 157.

Error 4: Error was committed in confirming the report of the said master that the bankrupt failed to keep books of account. The record discloses the fact that the bankrupt was simply an employee on a salary and had been such ever since the 16th day of March, 1906. [Tr. p. 7.] This was more than three years prior to the adjudication of bankruptcy. [Tr. p. 7.] Being simply an employee he was not required by the law to keep a set of books.

“The bankrupt not having been engaged in any business on his own account necessitating or rendering appropriate the keeping of books from which his financial condition might be ascertained, his omission to keep such does not bar his discharge.”

Sellers v. Bell, 94 Fed. Rep. 807.

Neither the objections nor the report of the master are sufficient in this particular upon which to base a find-

ing of conviction, or a conclusion that the bankrupt has violated the statute in this particular. The particular allegations in the objections are found at page 27 of the transcript, where it is charged that:

“Said bankrupt has with intent to conceal his financial “condition, failed to keep books of account or records “from which such condition might be ascertained.”

The report of the master is:

“That he did not keep any such books of account or any “records, and with the intent to conceal his true financial “condition.” [Tr. p. 14.]

The law as it stood at the time these proceedings were instituted was set forth in subdivision 2, section 14, of the Bankruptcy Act, from which we quote:

“With fraudulent intent to conceal his true financial “condition AND IN CONTEMPLATION OF BANKRUPTCY, “destroyed, concealed, or failed to keep, books of account “or records from which his true financial condition might “be ascertained.”

The law is plain that the statute in this particular must be followed, and it must appear that such act was done in contemplation of bankruptcy.

“Exceptions to the discharge of the bankrupt on the “ground that he did not keep proper books of account will “not be sustained when it is not shown that there was any “fraudulent intent, and in contemplation of bankruptcy “to conceal his true financial condition.”

99 Fed. Rep. 706;

109 Fed. Rep. 307;

96 Fed. Rep. 88;

96 Fed. Rep. 594;

102 Fed. Rep. 114;
96 Fed. Rep. 314;
106 Fed. Rep. 143;
107 Fed. Rep. 77;
108 Fed. Rep. 794;
115 Fed. Rep. 259.

Error 5: Error was committed in denying the application for the discharge of the said bankrupt.

“The fact that the bankrupt was reckless, improvident “and utterly incompetent to conduct his affairs does not “prevent his discharge.”

In re Bonner, 22 A. B. R. 151, 169 Fed. 729;
In re Alleman, 20 A. B. R. 745, 162 Fed. 693;
Cohn v. U. S., 19 A. B. R. 8, 168 Fed. 656.

The order of the referee in this proceeding that Mrs. Greenwood was the owner of the stock, even though not conclusive, until set aside is still presumptively the order of the court.

Sec. 1963, sub. 17, California Code of Civil Procedure;

Sec. 1909 California Code of Civil Procedure.

Section 1963, sub. 17, *supra*, provides:

“That a judicial record, when not conclusive does still “correctly determine or set forth the rights of the “parties.”

Section 1909 of the Code of Civil Procedure of the state of California declares:

“Other judicial orders of a court or judge of this state

“or of the United States, create a disputable presumption according to the matter directly determined.”

The case of Lamb v. Wahlenmeyer, 144 Cal. 91, 95, holds:

“The question in passing upon a plea of *res adjudicata* “is not whether the court decided the question involved “right or wrong, but the question is, did the court decide “the point?”

In discussing the assignment of errors we have confined ourselves to statutory grounds. The master's report takes occasion to go outside of the statutory grounds of objections as permitted by the Bankruptcy Act. All matters discussed relating to the dealings between the bankrupt and the corporation of which he was president are irrelevant and immaterial, and will not be taken up and discussed for that reason. The law is plain upon this point.

“The specifications of objections must exhibit, and “the evidence in support of them must prove, one of the “objections specified in law.”

Collier on Bankruptcy, page 188;

In re Frank, 6 A. B. R. 156;

Smith v. Keiger, 17 A. B. R. 4; 6 A. B. R. 703;
6 A. B. R. 73; 5 A. B. R. 703; 107 Fed. 83;
4 A. B. R. 544; 103 Fed. 64; and the many
cases cited under the citation of Collier on
Bankruptcy, *supra*.

The master in his report sets forth his findings in this matter as referee, in which he found Mrs. Greenwood to be the owner of the stock and recommended that the trustee bring an action, if it saw fit, to test the question

of said ownership. This was never done by the trustee as far as the report shows. The trustee should be confined to the remedy suggested. [Tr. p. 16.]

“The act is very liberal towards the bankrupt as to his “discharge, and strict construction of the terms under “which opposition will be sustained are had in favor of “the bankrupt’s discharge.”

Sec. 2467 Remington on Bankruptcy.

In re Glass, 9 A. B. R. 393, 119 Fed. 509.

Section 2467 Remington further provides:

“Section 14 (b) provides the judge ‘shall grant the “discharge unless certain acts are proved, and the lead-“ing act consists of offenses prohibited as crimes. More-“over, the defenses are so surrounded with qualifications “in favor of the bankrupt as to indicate clearly the inten-“tion of Congress that a strict construction of the act in “favor of the bankrupt so far as it relates to opposition “to discharge, must prevail.’”

In re Baudeyne, 3 A. B. R. 55, 96 Fed. 539.

The objector in the cause before the court is not entitled to very great consideration from the fact that neither he nor his assignor ever filed a claim in the proceedings. The law allows one year in which to file a claim. This law is a statute of limitations. If the party does not appear within the time his right is barred, and if he files objections after that period he should first show that he is a party in interest. This was not done in the case at bar. The claim was not filed until after this whole proceeding was heard, submitted and determined. The statute of limitations having run against the claim, it should now be held stale.

In conclusion, what good can it avail to deny this bankrupt his discharge? He has reasonably complied with all the provisions of the law. He has turned over what property he had. He is but a poor employee without assets. A liberal construction of the law should be made in his favor and give him an opportunity to begin life anew. A denial of this right will simply permit old creditors to harrass him and prevent him from entering successfully into any line of business. The report of the master in this matter is not sufficient to convict him of the wrong contemplated by the statute and thus to deny him the right of a discharge. Unless this is clearly shown, we contend that he is entitled to a discharge and the same should be granted him in the case at bar.

Respectfully submitted.

R. L. HORTON,

Attorney for Said Bankrupt and Petitioner.

No. 1997.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. L. Haley,
Petitioner,
vs.
John D. Pope,
Respondent.

In the Matter of
A. L. HALEY,
Bankrupt.

Brief of John D. Pope, Respondent, and Los Angeles Trust & Saving Bank, Trustee in Bankruptcy of the Estate of A. L. Haley, Bankrupt.

A full statement of this case is contained in the report of the Special Master, Honorable Lynn Helm, set forth in the petition for revision beginning on page one thereof.

We wish to call the special attention of the court to the following excerpt from the opinion of the Special Master:

"There is no doubt about the fact that the bankrupt is an architect, and that he took up this scheme of converting his property and the good-will of his business into a corporation known as the 'A. L. Haley, Architect,

Incorporated,' so that it might not be within the reach of his creditors, and that he could enjoy the benefits of it without accounting therefor to anyone whomsoever. It is evident that from the inception of the corporation to the time of the filing of the petition in bankruptcy, the bankrupt was to enjoy the benefit of the corporation and of all its earnings. That he had transferred the property to Mrs. Greenwood as security for a debt, or as her absolute property, when he continued to enjoy all the benefits of it, is such an unusual and improbable story that the mere recital of it is convincing that the property is the property of the bankrupt, and that if Mrs. Greenwood holds it at all, she only holds it as security for some alleged indebtedness due her from the bankrupt."

This case, on the facts found by the Special Master, presents one of the most brazen attempts of an individual to impose upon the bankruptcy court that has ever come under our observation.

The bankrupt, A. L. Haley, is an architect of considerable ability, and at the time of the filing of his petition was able to make a large income from his business. He owed a large amount of money for current obligations, as shown by his schedule. The extent of his income is indicated from the fact that he drew ten thousand dollars (\$10,000) from the "A. L. Haley, Architect, Incorporated," in addition to a salary of \$250 per month.

The corporation, the "A. L. Haley, Architect, Incorporated," was incorporated by A. L. Haley as a scheme of converting his property and the goodwill of his business into the corporation so that it might not be within the reach of his creditors, and that he could enjoy the benefits of it without accounting to anyone whomsoever. He managed and controlled the corporation, and the other stockholders and directors were mere dummies.

This matter is presented to the Circuit Court of Appeals by a petition for revision, and on such a petition the court of appeals will not review the findings of fact of the lower court. The review is had upon questions of law only. We will not therefore discuss the questions of fact which are raised in the petitioner's brief.

The first objection made to the decision of the lower court by the petitioner is that the assignment of the judgment in favor of Charles E. Fish to John D. Pope was not filed in this action until the 20th day of February, 1911, being the day upon which the transcript was written up. The original assignment was withdrawn on February 21st, and a copy substituted, which was proper. The endorsement on the assignment shows that it had been previously filed in the Superior Court of Los Angeles county, and that was the reason that it was not filed at the time of the hearing. It is immaterial what time the assignment was actually filed in the office of the Special Master, because at the time of the hearing it was agreed that subject to its relevancy, the assignment should be received in evidence.

At the hearing the fact of the existence of the assignment was put in evidence, and its contents stated, but the actual document was not in court, and it was agreed at that time that subject to the relevancy of the document it might be admitted in evidence. There was no question of its contents and no question of its existence. The only question reserved was whether or not the assignment was relevant. The Special Master had all of the information in regard to the assignment

in his possession at all times since the hearing, which was had on the 2nd day of November, 1910.

The Special Master states that it was agreed that the assignment should be received in evidence. [Tr. p. 4.] The Special Master does not say when it was agreed, but the fact is that it was agreed at the time of the hearing that it should be received in evidence, subject to its relevancy, and at that time all of the facts in relation thereto were discussed and no objection was made to the assignment, except that it was irrelevant.

We do not consider it necessary to make any further answer to the objection raised by petitioner, to-wit: "That John D. Pope never at any time filed any claim of any kind or character in said bankruptcy proceedings"; except to refer the court to the authorities set forth in the opinion of the Special Master on pages 4-6 Petition for Revision, and to the case of *In re Barrager*, decided by District Judge Reed, U. S. District Court, Northern District of Ohio, November, 1911, reported in 27 A. B. R., page 366, and cases therein cited. Also reported in

191 Fed. Rep., p. 247.

See also

In re Westbrook, 186 Fed. 414.

II.

On a petition for review the appellate court will not disturb the finding of the Special Master contained on page 11 of the petition, to-wit: "That under these circumstances for the bankrupt not to schedule the property and to continue to insist that the property is not his,

is a concealment of property from his trustee which should bar his discharge."

We do not feel that it is incumbent to further discuss the facts in this brief, inasmuch as the Special Master has set them forth so clearly in his findings, and the decisions referred to by the petitioner in his brief upon this point do not cover the facts contained in this case.

III.

The answer to petitioner's argument that the referee decided the question of the bankrupt having made a false oath two different ways and that the first decision was *res adjudicata* we refer the court to the opinion of the Special Master, pages 15 and 16, which shows that the Special Master, when sitting as the referee, rendered a decision which was on a rule to show cause, and that the referee held that inasmuch as Mrs. Greenwood was an adverse claimant to the stock, that he was powerless to make a summary order upon her to deliver it to the trustee.

The authorities cited by petitioner relating to this point are that a mistaken oath made in good faith will not prevent a discharge, but the Special Master, and the court below has found that this false oath was not made in good faith.

IV.

Petitioner makes two arguments against the findings of the Special Master to the effect that the bankrupt failed to keep books of account. His first argument is that the bankrupt was an employee on a salary. Even

if this were true, an employee on a salary is not allowed any greater latitude in concealing his property than any other person. But the opinion of the Special Master shows that Mr. Haley was not simply an employee on a salary; on the contrary, he was the whole corporation, and the corporation was under his control and guidance at all times and the Special Master finds that A. L. Haley did not keep any books of account himself, and that the A. L. Haley, Architect, Incorporated, company, did not keep any books of account. This question was discussed by the Special Master beginning on page 12 in the Petition for Revision.

The authorities cited by petitioner relating to this point all deal with cases where the bankrupt acted in good faith, and under conditions entirely dissimilar from those set forth by the Special Master.

V.

Petitioner in his brief, on page 16 thereof, under Error 5, repeats his claim that the decision of the referee, refusing to make a summary order upon Mrs. Greenwood to return the stock, was *res adjudicata* of all matters pertaining to the action of Mr. Haley in regard to such stock, and that consequently he should receive his discharge. The decision of the referee on that matter and the findings of the Special Master which were affirmed by the District Court on the opposition to the discharge, are so entirely different that it is not necessary to further discuss this matter. Petitioner cites the case of Lamb v. Wahlenmaier, 144 Cal. 91, which states that "the question in passing upon a plea of *res adjudicata* is not whether the court decided

the question involved right or wrong, but the question is, did the court decide the point?"

The referee did not decide the question of the right of the bankrupt to his discharge when he decided that he could not issue a summary order on Mrs. Greenwood.

The petitioner urges that the bankrupt should be discharged because he is a poor man. The only evidence upon this subject is that he had drawn a salary of two hundred fifty dollars (\$250) a month as an employee of the "A. L. Haley, Architect, Incorporated," company, and in addition to that he had overdrawn his account and taken from the company, under the resolution authorizing him to do its business, the sum of upwards of ten thousand dollars (\$10,000), and that he was indebted to the company in that amount, and that none of the stockholders had called upon him for an accounting, or asked him for money to apply upon dividends. He testified that his reason for drawing money in preference to the other people drawing it, was due to the fact that he owned all the stock, and that it was equivalent to declaring a dividend, but instead of declaring a dividend, he simply got the money from the secretary of the company whenever he wanted it. (Petition for Revision, pages 8 and 9.)

It is respectfully submitted that the decision of the Special Master and of the District Court should be affirmed.

Respectfully submitted,

SHANKLAND & CHANDLER,

*Attorneys for Respondent John D. Pope, and for
Los Angeles Trust & Savings Bank, Trustee in
Bankruptcy of the Estate of A. L. Haley, Bank-
rupt.*

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARY F. RAINES, as Administratrix of the Estate of DAVID L. RAINES, deceased,
Appellant,
vs.
W. R. GRACE & COMPANY, a corporation,
Appellee

No. 2011

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

SUPPLEMENTAL REPLY BRIEF
FOR APPELLANT

WILLIAM H. GORHAM,
Proctor for Appellant.

653 Colman Building,
Seattle, Washington.

FILED

JUN 26 1914

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARY F. RAINES, as Administratrix of the Estate of DAVID L. RAINES, deceased,
Appellant,
vs.
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No. 2011

Upon Appeal from the United States District Court
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SUPPLEMENTAL REPLY BRIEF
FOR APPELLANT

(Errata: Substitute the word "survive" for the word "create" in line 5, page 15; substitute the word "survives" for the word "created" in line 1, page 37, Appellant's Supplemental Brief.)

I.

The contention of appellee is:

That appellant in urging that the second

amended libel states a cause of action sounding on contract, is now setting up a *new* cause of action; and advances as argument against appellant being permitted to do so:

First, that on account of witnesses being no longer available it would not be doing justice, but denying it.

Second, that any application now to amend comes too late.

To this appellant replies: That she is not asking leave to add to, withdraw or in any way modify or change any allegation of the libel; on the contrary, she relies on those allegations. She alleges that those allegations state a cause of action on contract and asks the court to consider the substance and not the form, of the libel, so far as that form is expressed in the *preliminary* recital that it is a cause of tort, in accordance with the liberal practice obtaining in admiralty.

Appellee's exceptions to the libel are to the effect: that it does not set forth facts sufficient to constitute a cause of action against appellee.

As to the witnesses not now being available, whatever witnesses were once available appellee, it

had opportunity to put the machinery of the law in motion to avail itself of their testimony, either in this cause or in the manner provided for perpetuating testimony.

Furthermore, while there is nothing in the record to show whether or not testimony has been taken in this cause, in view of appellee's contention that witnesses are not now available, we think the fact can be disclosed without violating any propriety, that the testimony of the members of the crew who witnessed the accident alleged in the libel was taken in this cause upon proper notice to appellee long prior to the disposition of the cause in the lower court.

Even if changing the recital of the libel as to the nature of the action from "tort" to "contract" is to be considered an "amendment," such amendment is not too late, as shown by the authority cited by appellant's supplemental brief, pages 16-17. The authorities cited in appellee's brief, page 12, to the contrary, we submit, are not applicable to the admiralty practice.

II.

(a)

Appellee contends: That in the case at bar it was its duty to appellant's intestate to use due and reasonable diligence in providing safe and sound instrumentalities with which to perform his work, but contends that that duty arises out of the common law relation of master and servant.

Appellee concedes that the vessel and her owner are by both English and American law liable for injuries to seamen in consequence of unseaworthiness of the ship; concedes that the English law provides: In every contract of service between owner of a ship and seamen there shall be implied an obligation on the owner to use all reasonable means to insure seaworthiness; but contends that such duty is imposed by law and for a breach thereof an action *ex delicto* is maintainable.

Appellee's contention that the municipal law must govern relations between appellee and appellant, would abrogate the maritime law.

The fault in appellee's argument is, it fails to distinguish between those relations of master and servant where the master's duty is imposed by law

and cannot be “contracted out,” and those relations between owner of a ship and the seamen where the recognized exigencies of water-borne commerce permit such “contracting out”—for such freedom of contract is permitted under the British Merchant Shipping Act and under the general maritime law of the United States.

And therein lies the crux of the whole matter.

“If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded on contract and not upon tort. If on the other hand the relation of plaintiff and defendant be such that a duty arises from the relation irrespective of contract to take due care and defendants are negligent, then the action is one of tort.”

Kelly vs. Met. R. Co., I Q-B 944.

Cited in Ry. Co. vs. Laird, 164 U. S. 393.

II.

(b)

Appellee contends that even if appellant’s intestate could have brought an action *ex contractu* to recover damages, the case at bar is not such an action, for appellant’s intestate’s action for injury

died with him and appellant's action is

"A totally new cause of action;" "new in its species;" "new in its quality;" "new in its principle;" "in every way new;"

Citing many authorities construing Lord Campbell's Act and other statutes, including Federal Railway Employees' Liability Act (before amendment) *creating* a right of action where death ensued and citing *Crowley vs. Ry. Co.*, 30 Barbour 99, to the effect:

"If the cause of action set out in the complaint, therefore, could be considered as arising upon this contract, and surviving, by force of the statute, in behalf of the plaintiff as the representative of the deceased, then most certainly the action could be maintained."

That is the case at bar not only as to the *contract*, but as to the *survival*.

The statute of the State of Washington, upon which this action is based (Sec. 4838, Ball. Code) expressly provides that no action for personal injury occasioning death shall abate nor any such right of action determine by reason of death, but such action may be commenced and prosecuted in favor of the wife, etc.

Robinson vs. Reduction Co., 26 Wash. 484.

Mesher vs. Osborne, 33 Wash. Dec. 300.

Electric Company vs. Hartless, 144 Fed. 379,
C. C. A., 9th Cir.

III.

Appellee contends that the fact that the shipping articles were British form for service on a ship of British registry, flying the British flag, determines the law to be applied in this case, to-wit, the British law.

Where the owner *pro hac vice* is an American corporation and the seaman an American citizen, the law of the place of contract will govern, notwithstanding the service is on a ship of British registry flying the British flag.

Residence of owner not place of registry control as to law applicable.

The *Alice Tainter*, Fed Cas. 194-195, in which an American built vessel really owned by residents in New York, but put under the British flag, formally transferred to a British subject and registered in a British port, held: So far as revenue laws of the United States were concerned she was no longer an American vessel, but that she was not subject as a foreign vessel to a maritime lien for supplies, furnished in New York at the request of her real owners.

In *Chisholm vs. J. L. Pendergast*, 32 Fed. 415, Circuit Court, Southern District, New York, opinion by Judge Wallace, in which an American citizen, libellant, contracted with Pendergast, also an American citizen, the real owner of the ship, to act as its master, the vessel being a foreign built bottom, registered in the name of a British subject, and carrying the British flag, Held: Libellant dealt with Pendergast as owner and as between the parties the bark was an American vessel and libellant had no lien for services as master under the admiralty law of this country.

*Chartered Merc. Bank, etc., vs. Netherlands,
etc., Navigation Co.*, 5 Asp. Mar. Cases. 65.

Respectfully submitted,
WILLIAM H. GORHAM,
Proctor for Appellant.



**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

MARY F. RAINES, as Administratrix of
the Estate of David L. Rainey, deceased,
Libelant and Appellant,

vs.

W. R. GRACE & COMPANY, a corpora-
tion,
Respondent and Appellee.

No. 2011

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

**APPELLEE'S REPLY TO SUPPLEMENTAL
BRIEF OF APPELLANT**

STATEMENT.

The *second* amended libel alleges that on or about September 1, 1907, the libelant's intestate, David L. Rainey, signed shipping articles, British form, to serve as chief engineer of the British steamship "Cacique," whose registered owner was the New York & Pacific Steamship Company, Ltd., a corporation of Great Britain, on a voyage then about to be commenced from a port on Puget Sound to

a port or ports in Peru and return to the Pacific Coast of the United States of America. It may be here said that the shipping articles were signed before the British Vice Consul at Seattle, Washington. The second amended libel does not so state, but such an averment was contained in the two preceding libels, and it is agreed between the proctors for the respective parties that the second amended libel may be considered as containing such an allegation.

The second amended libel further alleges that on the 30th day of January, 1908, David L. Rainey, while on board the "Cacique" (the "Cacique" at that time being in the port of Mollendo, Peru), was burned by reason of the alleged unseaworthiness of the vessel, and, as a result of the injuries so received, died on February 25, 1908, in the hospital at Mollendo.

The second amended libel further avers that the libellant, Mary F. Rainey, is the administratrix of the estate of David L. Rainey and is the widow and sole heir of David L. Rainey; that David L. Rainey was her sole means of support; and that this action was brought for her sole benefit.

The respondent excepted to the libel on the grounds set forth on page 7 of appellant's brief.

ARGUMENT.

I.

When this cause was argued in the court below, libellant's right to recover was based upon the theory

that this was a tort action, and, as such, governed by the *lex loci delicti*. The libelant then contended, as she did in her original brief filed in this Court, that the *locus delicti* was Connecticut, for the reason that W. R. Grace & Co. was incorporated in that State. Annexed to libelant's brief in the court below was an exhaustive synopsis of the legislation of Connecticut relative to actions for death by wrongful act. It is now admitted that libelant's synopsis was incorrect in that it omitted the only relevant act of that State. The act omitted was passed on June 18, 1903 (page 149 of the Acts of 1903), and repeals Section 1094 and Section 1119 of the Connecticut Code, as amended by Chapter 149 of the Public Acts of 1903. The act of June 18, 1903, is therefore the only statute of Connecticut which now grants a cause of action for death arising from wrongful act, and by Section 4 of the act it is provided that all suits brought by virtue thereof must be commenced within one year from the neglect complained of and that no amount in excess of \$5,000 can be recovered.

At the time of the argument in the court below, as well as in the preparation of the initial brief of respondent herein, we relied upon the case of *Radezky v. Sargent*, 58 Atl. 709, which cites the act of June 18, 1903, and holds that the time within which actions for death by wrongful act must be brought is not a limitation of the remedy alone, but is a limitation of the liability itself; in other words, that the bringing of a suit within the time prescribed is a condition precedent to the right to sue at all.

While it is true that the proctor for libelant overlooked the citation of the act of June 18, 1903, in the Radezky case and did not know of the existence of that act at the time of the service of his brief in this Court, yet it will not be denied by him that he did know of the existence of this act shortly prior to September 13, 1911, the date this case was originally set for argument before this Court. The Court will remember that the reason assigned at that time for not arguing and finally submitting this case was that a controversy had arisen between the libelant and the Clerk of this Court as to the amount of costs to be paid by libelant for filing the record.

Now, we concede that a court of admiralty is not bound by the technical rules of pleading and forms of procedure prevailing in actions at common law. The 23rd admiralty rule, however, provides as follows:

“All libels in instance causes, civil or maritime, shall state the *nature* of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of *tort* or damage, or of salvage, or of possession, or otherwise, as the case may be.” (Italics ours.)

The second amended libel in this cause avers that this action is “a case of *tort*, civil and maritime.” All the libels filed in this cause have made such an averment, and the reason advanced by libelant’s proctor in his initial brief to sustain the sufficiency of the libel proceeded upon the theory that this was a tort action. If it was such, there never has been

any serious question but that libelant could not recover. The truth of this statement will be apparent from the fact that in our original brief we did not endeavor even to determine by what law this case was governed; we made it manifest that whether this action was governed by the law of Connecticut, Great Britain or Peru, the same result necessarily followed. If anything more is needed to demonstrate the correctness of our position, the supplemental brief of libelant furnishes the required proof.

No reason existed, therefore, why respondent should make any effort to keep track of the witnesses to the accident complained of. Over six years have elapsed since the date of Rainey's death, though no part of this delay is attributable to respondent. This Court knows that sailors are here today, and gone tomorrow; that by this time the seamen on the "Cacique," if alive, are dispersed to the four quarters of the earth. Recognizing that defendants in actions of this kind might be subjected to great injustice through the loss of witnesses, if actions of this character were not promptly brought, Lord Campbell's Act and the vast majority of American statutes, modeled thereon, limit the time in which an action based upon such statutes may be brought to one year. Particularly in view of the wanderings of sailors, every reason exists why a case of this kind should be promptly brought. This action, however, was not commenced until twenty months after Rainey's

death, and it is fair to say that if this suit had been commenced within one year the present contention would never have been made. No reason nor excuse has ever been offered why this suit was not brought within one year. To permit, therefore, the setting up of practically a new cause of action after the lapse of over six years, and when witnesses are no longer available, is not to do justice, but to deny it.

Libelant, however, contends that she may now set up a new cause of action, and in support of her contention cites the case of *California-Atlantic S. S. Co. v. Central Door & Lumber Co.*, 206 Fed. 5. That case is not in point for two reasons.

The question for determination there was whether facts were alleged which showed affirmatively that the court had *jurisdiction* in *admiralty*. The court's *jurisdiction* as an admiralty court is not involved in the case at bar. The question for determination here is the *nature* of the cause.

The Act of August 23, 1842 (Rev. Stat. § 917); provides that "the Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the Court, and generally to regulate the whole practice to be used

in suits in equity or admiralty of the Circuit and District Courts.” In pursuance of this act the 23rd admiralty rule was promulgated. No rule of court, however, can alter or enlarge the jurisdiction of the courts of the United States.

The St. Lawrence, 1 Black, 522.

In re Kirkland, Fed. Cas. No. 7842.

“But there is a wide difference between the power of the court upon a question of *jurisdiction* and its authority over its *mode of proceeding* and process.” (Italics ours.)

The St. Lawrence, 1 Black, 522, 527.

The rules promulgated by the United States Supreme Court do not relate to the question of jurisdiction (*The St. Lawrence, supra*; *In re Kirkland, supra*); they do relate to questions of practice and procedure, and “the practice and proceedings” of admiralty courts “are regulated by rules prescribed by the Supreme Court of the United States.” (*Bruce v. Murray*, 123 Fed. 366, C. C. 9th Circuit.)

The proctor for libelant has, therefore, utterly misconceived the doctrine enunciated in the California-Atlantic S. S. Co. case. To adopt his construction of the language therein used would be to make Rule 23 of no effect, though that rule, as said by this Court, *regulates* the practice and proceedings in admiralty cases.

The above mentioned case is not in point for another reason. This Court, having determined that

the court below had no jurisdiction of the cause as a case in admiralty, remanded the cause with leave to the appellee so to amend its libel, if possible, as to show that the court did have jurisdiction in admiralty. The contract in that case was made in December, 1910, and the case was decided by this Court in May, 1913, only two and one-half years thereafter. Any action upon the contract there involved would consequently not have been barred if suit had not been commenced until after May, 1913. But in the case at bar a new cause of action is set up after the statute of limitations has run. That it is a new cause of action, there can be no doubt. The case attempted to be made by the supplemental brief is based upon an alleged breach of an implied warranty of seaworthiness. There is no mention, however, made in the second amended libel of any such warranty. On the contrary, that libel, after setting forth the citizenship and residence of Rainey and his wife, the death of Rainey, the appointment of Mrs. Rainey as administratrix of the estate of Rainey, the incorporation of the New York & Pacific Steamship Company, the incorporation of W. R. Grace & Company, the terms of the charter party by which the "Cacique" was chartered to Grace & Company, the license of Rainey, the signing of shipping articles, British form, by Rainey, the voyage contemplated by the shipping articles, the rate of compensation to be paid to Rainey, the age and expectancy of Mrs. Rainey, the age and expectancy of Rainey, avers that the "Cacique" was an oil

burner using oil as fuel for the purpose of generating the steam used in operating an electric dynamo illuminating the ship; that the feed pump on said steamship used for supplying oil as fuel for the purpose aforesaid was liable to become clogged with oil and fail to supply sufficient or any oil for fuel purposes and would require to be put in working order again before the work of the vessel could go on, which was or should have been known to respondent; that the steamship was not furnished or supplied with safety lamps from which the volatile fumes of the fuel oil would be protected and ignition therewith thereby prevented when the dynamo was out of commission and other means of illuminating had to be resorted to to enable the crew to do the work necessary aboard the vessel; that on the 30th day of January the feed pump became clogged with oil and in consequence the dynamo was put out of commission; that it then became necessary and the duty of Rainey to put the feed pump in working order in order that the dynamo might be kept running to the end that the work of the vessel might proceed; that in the prosecution of the duty of putting the feed pump in working order, Rainey was obliged to use a Dietz lamp; that the volatile fumes of the oil arising from the fuel oil in the feed pump became ignited by the flame of said lamp, thereby occasioning an explosion of the gas and the fuel oil in the feed pump; that Rainey was subjected to the flames of burning oil and was burned about the head and body, from the effects of which he died

on February 25, 1908, in the hospital at Mollendo, Peru; "all of which was through no fault, negligence or want of care on the part of said David L. Rainey * * * but solely through the failure of said respondent to keep and maintain said steamship in a seaworthy condition as aforesaid."

Continuing, the second amended libel avers:

"That the *laws* of the United States *in force* at all of said times between the 1st day of August, 1907, and the 30th day of January, 1908, provided, *inter alia*, that in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof there is implied, notwithstanding any agreement to the contrary, an *obligation* on the owner of the ship that the owner of the ship shall provide a seaworthy ship for the voyage at the time of the commencement of the voyage and shall keep said ship in a seaworthy condition for the voyage during the voyage;" (Article XVI).

The libel also sets forth a portion of Section 458 of the Merchants' Shipping Act of Great Britain, and alleges that by reason of the foregoing facts the libellant has been damaged in the sum of \$25,000, and that the action was brought for the benefit of Mary F. Rainey.

It will thus be observed that the libel alleges that there is a statute of the United States which imposes upon shipowners the *obligation* or duty to provide a seaworthy vessel. We say that the libel

alleges that there is such a statute, for the phrase "the *laws* of the United States in *force*" can mean nothing else. Counsel now says that there is no such statute (Supp. Brief, p. 26), but the non-existence of such a statute is immaterial in determining whether the second amended libel states a cause of action for tort or on contract. The second amended libel does aver that there is such a statute. According to libellant's own theory, if there is such a statute, this is an action for tort. The averment therefore of such a statute made this an action for tort.

Escape from this theory is also sought by the statement that "there is no allegation in the libel that the respondent knew of the unseaworthy state of the Cacique alleged, only an allegation that that state existed from the commencement of the voyage. There is no affirmative allegation of negligence on the part of the respondent." (Supplemental Brief, p. 27.) Assuming that there is no averment of an affirmative act of negligence in the libel, yet the lack of such averment does not change the nature of the cause of action. "A tort," says Mr. Pollock, is "an act or *omission* causing harm which the person so acting or *omitting* did not intend to cause, but might or *should with due diligence have foreseen and prevented.*" (Pollock on Torts, 1, 19.)

It will be noted that the libel avers "that the feed pump on said steamship, used for supplying oil as fuel for the purposes aforesaid, was liable to become clogged with oil, fail to supply sufficient or

any oil for fuel purposes, and would require to be put in working order again before the work of the vessel could go on, which *was* or *should have been known* to respondent." All that this allegation means, all it can mean, is that respondent "should, with due diligence, have foreseen and prevented" the injury to Rainey.

The second amended libel, then, avers facts which show that there was a duty imposed by positive law upon the respondent, a failure or omission to perform that duty by respondent, which omission resulted in the death of libelant's intestate, and that by reason of the death of libelant's intestate the libelant has suffered pecuniary damage. There is, as we have said, no allegation of an implied warranty nor of breach of such warranty, both of which would be necessary allegations in an action for breach of contract (*Atlantic & Pac. Ry. Co. v. Laird*, 164 U. S. 393, 398.) Clearly, therefore, the statement in the libel itself that the case was one of tort, civil and maritime, accurately describes the nature of the cause.

If, therefore, it is now sought to amend the libel by alleging a cause of action on contract, the amendment comes too late.

- Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285.
- Boston & M. R. R. v. Hurd*, 108 Fed. 116.
- Despeaux v. Penn. R. R. Co.*, 133 Fed. 1009.
- Carmichael v. Argard*, 9 N. W. 470.
- Klipstein v. Raschein*, 94 N. W. 63.
- Box v. Chicago, R. I. & P. Ry. Co.*, 107 Iowa 660, 78 N. W. 694.

- Chicago & Alton R. Co. v. Scanlan*, 48 N. E. 826.
Georgia Railroad & Banking Co. v. Roughton, 34 S. E. 1026.
Peterson v. Pennsylvania R. Co., 46 Atl. 112 (1900).
Skidaway Shell Road Co. v. O'Brien, 73 Ga. 655.
Moyer v. Ramsay-Brisbane Stone Co., 119 Ga. 734, 46 S. E. 844 (1904).

II.

Not A Contract Action.

(a) Conceding, for the sake of argument, that libelant may now contend that this is an action for breach of contract, nevertheless there can be no recovery, for this is not a contract action at all.

The argument for libelant, as we understand it, may be put in the following form, though, as will be seen, it is impossible to reduce it to a syllogism:

There was no positive statute law requiring respondent to provide Rainey at the commencement of the voyage with a seaworthy vessel; therefore, there was no obligation or duty on the part of respondent to exercise reasonable care to provide him with a seaworthy ship.

There was implied in the contract of employment between Rainey and respondent a *warranty* that the "Cacique" was seaworthy at the commencement of the voyage and that such condition of the vessel would be maintained throughout the voyage.

Therefore, there was no duty on the part of the respondent, apart from the warranty implied in the contract, to provide Rainey with a seaworthy vessel,

and, under the rule laid down in *Kelly v. Met. R. Co.* (1895), 1 Q. B. 944, this must be an action for breach of contract.

Now, the fallacy of this reasoning lies in the assumption, first, that because no statute provides that the shipowner must in all circumstances provide a seaman with a seaworthy ship, there is no duty on the part of the shipowner to use reasonable care to provide such a ship; second, that a warranty of seaworthiness is implied in the contract of service. We think, however, there is a duty on the part of the shipowner to use all reasonable means to provide the seaman with a seaworthy ship, both at the commencement of the voyage and during the voyage. Is not this duty exactly the same in principle as the duty of a master at common law to provide his employe with a safe place to work and proper appliances or instrumentalities with which to work? This obligation of any master is as much an obligation implied from the contract of service as is the obligation now under consideration.

“It is well-settled,” says Mr. Labatt, “that the duties of a master to his servants arise out of the contract of employment, and are limited to those obligations which, under that contract, he has impliedly agreed to perform. Stated in their most general form, these duties are: (1) To see that suitable instrumentalities are provided; (2) to see that those instrumentalities are safely used.”

Labatt on Master & Servant (2d Ed.), § 898.

Continuing, Mr. Labatt states that the word "instrumentalities" includes machinery, apparatus, premises and servants.

Now, while this duty is generally expressed by saying that the master is *bound to provide* his employe a safe place in which to work and safe instrumentalities with which to work, yet this statement does not mean and was never held to mean that the master is an *insurer* of the servant's safety. All that can be required of the master is that he shall use due and reasonable diligence in providing safe and sound instrumentalities.

"So far as there is any guaranty on his part, it is merely that due care shall be exercised in furnishing and maintaining the instrumentalities."

Labatt on Master & Servant (2d Ed.), § 919.

"There is no warranty that machinery shall be so complete that no injury shall be incurred by the servant."

Weems v. Mathieson (1861), 4 Macq. H. L. Cas. 215.

"A master does not warrant the soundness of the materials furnished by him."

Ormond v. Holland (1858), El. Bl. & El. 102.

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employes. Nor

are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, *bound to use all reasonable care and prudence* for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employe or servant." (Italics ours.)

Washington & Georgetown Railroad v. McDade, 135 U. S. 554, 570.

Patton v. Texas and Pac. Ry. Co., 179 U. S. 658, 664.

Failure to use due care, "all reasonable care and prudence," is therefore a breach of the implied obligation of the contract of hiring, but it has never been held that such breach gave rise to an action *ex contractu*.

"The duty owed the servant, for example, in respect to the condition of premises and machinery, has been supposed to exist by virtue of contract. But duty, if derived from contract at all, is only implied in it; and, if new terms are to be inserted into the agreement, every duty which the master owes might be treated as con-

tractual, and thus the servant might sue the master in contract for assault and battery. The universal trend of authority on analogous cases is to regard such duty as not contractual, but as of the general law."

Jaggard on Torts, Vol. II, § 259, p. 899.

The duty of a shipowner, we think, is, in this regard, the same as that of any other master. While the general maritime law governs the case at bar, yet "it must be borne in mind that the maritime law is not in itself a complete and perfect system."

"In all maritime courts," said Judge Brown in *The City of Norwalk*, 55 Fed. 98, 107, "there is a considerable body of municipal law that underlies the maritime as the basis of its administration. Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns, maritime transactions. The general body of the law as regards the ordinary fundamental rights of persons and property, whether on land or sea, is, as observed by Mr. Justice Field in the passage above quoted, derived from the constituted order of the state, i. e., from the municipal law, which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects."

That the case at bar does not fall within the qualification expressed in the last clause of the foregoing quotation is manifest from the following cases.

In *Halverson v. Nisen*, 3 Sawyer 562, an action was brought to recover compensation for injuries sustained by a seaman by reason of the giving away of a rope to which a triangle on which the seaman was working was attached. The Court said:

“If, by the owner’s negligence, the rigging or apparel are defective, and the seaman sustains an injury in consequence, the owner would be liable. His liability in this respect does not differ from that of any other master to a servant in his employment. It is the master’s duty in all cases to use *ordinary care and diligence* to provide sound and safe materials for his servants. But he does not *warrant* them to be so nor *insure* the servant against the consequences of their defects.” (Italics ours.)

The following cases either enunciate a like doctrine or impliedly assume the correctness of such doctrine.

- Grimsley v. Hankins*, 46 Fed. 400.
The Lowlands, 142 Fed. 888.
The Henry B. Fiske, 141 Fed. 188, 190.
The France, 59 Fed. 479.
The P. P. Miller, 180 Fed. 288, 290.
Brown v. The D. S. Cage, 1 Woods 401, 403.
The Argo, 210 Fed. 872.
The Lizzie Frank, 31 Fed. 477.
The Edith Godden, 23 Fed. 43.

These cases, therefore, demonstrate that even though there be no statute imposing an absolute duty upon the owner to provide a seaworthy vessel, yet there is a duty imposed by law upon owners to

use reasonable care to furnish sailors with a seaworthy ship, and for breach of such duty the seaman must maintain an action *ex delicto*. Appellant, however, seeks to meet this argument by asserting that in every contract of service between shipowner and seaman there is an implied warranty on the part of the shipowner that the vessel shall be seaworthy at the commencement of the voyage and shall be so kept during the voyage, and it is insisted that *The Osceola*, 189 U. S. 158, is an authority for this proposition. Such, however, is not the holding of the *Osceola* case, and there is ample authority that no warranty of this character is implied in the contract of service.

In *Grimsley v. Hankins*, 46 Fed. 400, Judge Toulmin said:

“The defendant did not *covenant* to furnish machinery and appliances that were safe beyond a contingency, nor did he *warrant* the competency of fellow-servants. But he was required to use due care and reasonable diligence for the protection of his employees.” (Italics ours.)

In *The Henry B. Fiske*, 141 Fed. 188, 190, it is said:

“As regards the crew employed on board a vessel, there is no *warranty* on her part that none of her fittings or appliances shall at any time give way, to their injury. Liability on her part, in the case of an accident of this kind, is incurred only when those who represent her

have failed to exercise reasonable care to make the fitting or appliance safe, and arises only out of such defects as reasonable care on their part would have discovered and remedied.” (Italics ours.)

“An employer,” said Judge Wallace in *The France*, 59 Fed. 479, “does not undertake absolutely with his employes for the sufficiency or safety of the appliances furnished for their work. He does undertake to use all reasonable care and prudence to provide them with appliances reasonably safe and suitable. His obligation towards them is satisfied by the exercise of a reasonable diligence in this behalf.” (Italics ours.)

In *The Lizzie Frank*, 31 Fed. 477, a case in which a seaman was injured by the failure of the ship-owner to provide a sufficient chock, it is said:

“According to the English law, there is no implied warranty of seaworthiness in a contract between an owner of a ship and a seaman to serve on board of her. But it is said that this is repugnant to the American law. On consulting the American authorities, we find it stated that the owner, among other obligations to the seaman, is bound to provide a seaworthy ship, and that this means that at the commencement of a voyage the ship shall be furnished with all necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy. Seaworthiness includes a

competent crew. Yet the owner does not *warrant* to each seaman the competency of the others. *The E. B. Ward*, 20 Fed. Rep. 704; *Dixon v. The Cyrus*, 2 Pet. Adm. 411.” (Italics, the Court’s.)

Now not only do these cases establish the proposition that there is no implied warranty of seaworthiness in a seaman’s contract, but *The Osceola*, instead of denying the correctness of this proposition, supports it. A reading of that case will demonstrate that the Supreme Court of the United States deems that the law of this country with reference to the furnishing of a seaworthy vessel to the crew is the same as the law in England. On page 173 it is said of the holding in *The Edith Godden* case that it is in line “with *English* and American authorities holding owners to be responsible to the seaman for the unseaworthiness of the ship and her appliances.” On page 175, Mr. Justice Brown remarks:

“That the vessel and her owner are, both by *English* and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.” (Italics ours.)

And again:

“It will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the ex-

pense of maintenance and cure in cases arising from unseaworthiness. This departure originated in *England* in the Merchants' Shipping Act of 1876, above quoted, *Couch v. Steel*, 3 El. & Bl. 402; *Hedley v. Pinkney &c. Co.*, 7 Asp. M. L. C. 135; 1894 App. Cas. 222, and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel." (Italics ours.)

What, therefore, does the English law provide? Section 458 of the Merchants' Shipping Act is as follows:

"(1.) In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an *obligation* on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall *use all reasonable means* to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage.

(2.) Nothing in this section—

(a.) shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the sending of the ship to sea in such a state was reasonable and justifiable; or

(b.) shall apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession.”

(Italics ours.)

It is argued by proctor for libelant that this statute implies a warranty of seaworthiness of the ship at the commencement of the voyage in every contract of employment. Clearly, however, no such warranty is implied. By the statute, an *obligation* or *legal duty* (for they are synonymous terms—Bouvier, Vol. 2, p. 533; 15 How. Prac., 48, 55), to use *all reasonable means* to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage is imposed upon the shipowner, except in those instances when, owing to special circumstances, the sending of the ship to sea in an unseaworthy condition is reasonable and justifiable; or when the ship is employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession. The duty, therefore, to use all reasonable means to provide a seaworthy ship, except in

the instances specified, is exactly the same as the duty of any other master, viz., to use all reasonable means to provide his servants a safe place in which to work and safe instrumentalities with which to work.

Furthermore, the cases cited in *The Osceola* as evidencing "the general consensus of opinion among the Circuit and District Courts" show conclusively that our construction of *The Osceola* case is correct.

For instance, in *The Edith Godden*, 23 Fed. 43, the first case cited by Justice Brown relevant to this proposition, it appears that the seaman was injured in part by reason of a defect in a hook forming a part of the derrick appliance, and partly by reason of the fact that the brake attached to the winch could not be used because it was out of order. Judge Brown said:

"I cannot doubt that the real cause of this accident was in the overweight, or strain incident to the use of this derrick and winch, in lowering so heavy a weight in a rolling sea. It is not a case of any latent defect; for the testimony of the experts negatives any such cause. Nor is there proof of any definite act of negligence on the part of the men that were using or handling the winch or the derrick. *The machinery must therefore be deemed itself insufficient for the use to which it was applied, under the particular circumstances where it was thus used.* Upon the evidence it must be inferred, moreover, that the owners were responsible for

the use of this machinery under the circumstances that caused it to break and injure the libelant. * * * *Their legal duty by the municipal law*, was to *exercise due care* in providing machinery adequate and proper for the use to which it was to be applied, and to maintain it in like condition. *Kain v. Smith*, 80 N. Y. 458, 467; *Devlin v. Smith*, 89 N. Y. 470; *The Rheola*, 19 Fed. Rep. 926.” (Italics ours.)

In *The Rheola*, 19 Fed. 926 (cited by Judge Brown in *The Edith Godden*) Judge Wallace said:

“The libelant was performing a service in which the shipowners had an interest, and which they contemplated would be performed by the use of appliances which they had agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger than they were under to the master stevedore, his employer. There was *no express contract obligation*, on their part, to either, to provide safe and suitable appliances; but they were *under an implied duty* to each; and the measure of the duty towards each was the same. What would be negligence towards one would be towards the other. (*Coughtry v. Globe Co.*, 56 N. Y. 124; *Mulchey v. Methodist Society*, 125 Mass. 487.)

“The implied obligation on the part of one who is to provide machinery or means by which a given service is to be performed by another, is to use proper care and diligence to see that

such instrumentalities are safe and suitable for the purpose. ‘It is the duty of an employer inviting employees to use his structures and machinery, to use proper care and diligence to make such structures and machinery fit for use.’ (*Wharton on Negligence*, § 211.) If he knows, or, by the use of due care, might have known, that they were insufficient, he fails in his duty. This doctrine is cited with approval in *Hough v. Railway Co.* (100 U. S. 200).’’ (Italics ours.)

Again, in *The Frank and Willie*, 45 Fed. 494 (*The Osceola*, p. 174), it is said:

“Employers are required to provide workmen with reasonably safe conditions for work, according to the nature of the business, and to the customary provisions for the safety of life and limb.”

And further on:

“The same principle has been repeatedly applied in this court in favor of stevedores or their employes on board.”

It would serve no useful purpose to review all the cases commented on in the opinion in *The Osceola* case. A mere reading of them, however, will disclose that in every case the decision of the court is not based upon any implied warranty of seaworthiness in the contract of service, but upon that duty of the master which pervades all the law of master and servant, whether the service performed be upon land or sea, namely, the duty to use “all reasonable means,” “all reasonable care and pru-

dence" to furnish to servants safe instrumentalities, using the word "instrumentalities" in its broadest sense.

The remaining authorities cited by libelant are not contradictory of the position which we have taken. The statement in Parsons on Shipping and Admiralty (Vol. 2, p. 78) is that "the owner is bound to provide a seaworthy ship." Obviously, however, this does not mean that there is any warranty of seaworthiness implied in the contract of employment. The books are full of similar statements, such as, "The master is bound to provide a safe place to work;" "is bound to provide safe and suitable instrumentalities." But, as we have pointed out, this is but a short way of saying "The master is bound to exercise due diligence to provide a safe place to work and safe instrumentalities with whch to work."

In *Dixon v. The Cyrus*, 2 Pet. Adm. 407, Fed. Cas. No. 3930, it is said:

"That law and reason will imply sundry engagements of the captain and the mariners," one of which engagements is "that at the commencement of a voyage the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy."

But it may equally well be said that law and reason have implied sundry engagements of any master to any servant; the most important of such implied engagements being that the master shall

use due care to furnish safe and suitable instrumentalities. A breach of this implied engagement does not give rise to an action on contract; it does give rise to an action for tort, and libelant, therefore, properly characterized her action as "a case of tort, civil and maritime."

(b) Other considerations, however, compel the same conclusion. The libelant was not a party to the contract of September 1, 1907. That contract was the contract of David L. Rainey, a contract purely personal and non-assignable. Assuming, for the sake of argument, that if Rainey had lived he could have brought an action *ex contractu* to recover damages for the pain, suffering or other loss sustained by him, yet this is clearly not such an action. Rainey's action for pain, suffering, etc. died when he died. "It is settled law that actions arising out of contract, express or implied, will not survive where the damages sustained by such breach are for *injuries to the person*, as mental anguish, pain of body, or injury to character" (*Feeary v. Hamilton*, 140 Ind. 45, 39 N. E. 516, and cases cited therein), for "whether an action survives, depends upon the *substance* of the cause of action, not on the forms of proceeding to enforce it."

Schreiber v. Sharpless, 110 U. S. 76, 80.

Martin's Admr. v. B. & O. Ry. Co., 151 U. S. 673, 692.

This action, however, is not brought to recover damages sustained by Rainey; it is brought to secure the pecuniary damages sustained by Mrs.

Rainey by reason of Rainey's death. Now a cause of action for the recovery of damages for pecuniary injury resulting from death is purely a statutory one. It is not founded upon the violation of any natural right known to the common or maritime law.

Insurance Co. v. Brame, 95 U. S. 754.

The Harrisburg, 119 U. S. 199.

It is a totally new cause of action, "new in its species, new in its quality, new in its principle, in every way new," one which is wholly distinct from and not a revivor of the cause of action which, if he had survived, the decedent would have for his bodily injury.

The Vera Cruz, 10 App. Cas. 59.

Mich. Central R. R. Co. v. Vreeland, 227 U. S., 59, 69.

Martin's Admir. v. B. & O. Ry. Co., 151 U. S. 673, 696.

Whitford v. Panama R. R. Co., 23 N. Y. 465.

Wooden v. Western N. Y. & P. R. Co., 26 N. E. 1050.

Munro v. Pacific Coast etc. Co., 84 Cal. 515.

Davis v. New York & N. E. R. Co., 3 N. E. 815.

Actions of this kind, however, have always been held to be tort actions, not contract actions.

"The objection that the case is not a *marine tort*, but only a statutory one, is of the same nature as the objection last considered. Before the statute, the case was *damnum absque injuria*; by the statute, it became at once a tort in the full legal sense, and a *marine tort* by

reason of its place, its nature, and its circumstances, within the definition given by Mr. Justice Blatchford in *Leathers v. Blessing*, 105 U. S. 626, 630, and as stated also in previous decisions." (Italics, the Court's.)

The City of Norwalk, 55 Fed. 98, 110.

In *Crowley v. Panama R. R. Co.*, 30 Barbour, 99, 109, the Supreme Court of New York said:

"Here was an express agreement made in this state safely to transport the plaintiff's intestate over the defendants' rail road as a passenger, which, if Crowley, from the negligence of the defendants' agents, or servants, had sustained any injury on the said rail road, that he had survived, would unquestionably have entitled him to maintain his action therefor, in this state. If the cause of action set out in this complaint, therefore, could be considered as arising upon this contract, and surviving by force of the statute, in behalf of the plaintiff as the representative of the deceased, then most certainly the action could be maintained in this state. But such is not this action. It is not upon the contract. It is founded upon a *tort*. No right of action for injuries to the person of Crowley can survive; for '*actio personalis moritur cum persona.*' The cause of action under the acts of 1847 and 1849 is a *new* and *original* one, *given by and depending wholly upon the statute.*" (Italics, the Court's)

In *Hegerich v. Keddie*, 1 N. E. 787, the Court of Appeals of New York, speaking by Ruger, C. J., said:

“If, therefore, we consider this cause of action as a property right, it is as such a right based upon a *tort*, and, except as otherwise provided by the statute creating it, must be governed by the existing rules of law applicable to such causes of action.”

To cite additional authority would be useless.

III.

Furthermore, what has the law of Washington to do with this case?

The shipping articles were in the form prescribed by the laws of Great Britain; they were signed before the British Vice Consul at Seattle; the Cacique was owned by a corporation of Great Britain registered under British laws and flew the British flag.

“Ships,” said Judge Hanford, in his opinion in this case, “wherever they may be are deemed part of the country to which they belong and the persons on board are amenable to the laws of that country.”

“Whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the law of the country to which the ship belongs. *In re Ross*, 140 U. S. 453, 11 Sup. Ct. 897; *Wilson v. The John Ritson*, 35 Fed. Rep. 663.”

The Belvidere, 90 Fed. 106, 109.

- The Magna Charta*, 2 Lowell, 136.
The Egyptian Monarch, 36 Fed. 773.
The Lamington, 87 Fed. 752.
London Assurance v. Companhia de Moagens,
167 U. S. 149.

The exceptions to the libels were properly sustained.

Respectfully submitted,

HUGHES, McMICKEN, DOVELL & RAMSEY,
OTTO B. RUPP,
Proctors for Appellee.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. I. LAMPRECHT and
F. M. AIKEN, Trustees, Appellants,
Petitioners,
vs.
SOUTHERN PACIFIC RAILROAD
COMPANY,
KERN TRADING AND OIL COM-
PANY, and T. S. MINOT, Appellees,
Respondents.

No. 2028
In Equity

BRIEF ON BEHALF OF PETITIONERS
For Certification of a Question of Law to the Supreme Court.

D. J. HINKLEY,
1008 Wright and Callender Building,
Los Angeles, California,
Solicitor for Petitioners.

Filed this..... day of November, 1914.

M. D. M.
FRANK D. MONCKTON, Clerk.

By..... NOV 6 - 1914 Deputy Clerk.

F. D. Monckton,

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Since preparing this brief, it has occurred to counsel that it ought to contain an orderly outline of the principles which control the decision in the Barden case, in their application to the case at bar.

Outline.

1. The grant is created, *in praesenti*, and defined by the granting act, which vested the title in the grantee.
2. No mineral lands can pass by any operation of the granting act, because all mineral lands are excluded from all of its operations.
3. All authority derivable from the granting act, even its authority to do all things necessarily prerequisite to issuance of the patent, and the authority to issue the patent, are all operations of the act; therefore,
4. The government's title to mineral lands, whether known or unknown, cannot be affected by exercise of any such authority.
5. All mineral lands, known and unknown, being so expressly excluded from the jurisdiction derived by the Land Department from the granting act, the issuance of the patent thereunder is not a determination or official declaration that the lands described in it are non-mineral, nor can such patent create a presumption that they are non-mineral; because:
 - A. The Land Department is a special, inferior tribunal.

- B. That Department cannot adjudge conclusively its own jurisdiction.
- C. The records of that Department must show its jurisdiction and its lawful exercise.
- D. The patent issued shows jurisdiction in that Department to issue it and lawful exercise of that jurisdiction; because:
 - (1) It complies in terms and import with the definition of the grant created and defined by the granting act.
 - (2) Its exception and exclusion clause is notice of a restriction and condition of the grant by the granting act.
 - (3) The granting act furnishes no authority to adjudicate the character of mineral lands; because:
 - (a) Such authority, if it existed, would be an operation of the granting act.
 - (b) All mineral lands are excluded from all operations of the act; therefore:
 - (c) All mineral lands would be excluded from that authority to adjudicate, if it existed.

- (4) The fourth section of the granting act directs the issuance of a patent which shall comply in terms and import with the definition of the grant created and defined by the granting act.
- E. Neither the patent issued nor the record of the proceedings wherein it was issued, shows jurisdiction to issue a patent not containing a notice of the exception and exclusion of mineral lands contained in the granting act; because:
- (1) Both the patent issued and the records of the proceedings where it was issued show that it was issued wholly by authority of an act of Congress from the authority of which mineral lands were excluded, whether known or unknown; therefore:
 - (2) Such act could furnish no authority to adjudicate the character of mineral lands and to omit them from the descriptive part of the patent.
 - (3) Neither the patent issued nor the record of the proceedings where it was issued, shows by the recital or otherwise, either:

- (a) That the lands described in the patent had been previously adjudged non-mineral by authority of some law other than the granting act; or,
 - (b) A statement of any kind that the lands are non-mineral.
- (4) The issuance of a patent by authority of an act of Congress from all authority of which all mineral lands are excluded, can neither:
- (a) Raise a presumption that the lands so patented had previously been adjudged or determined to be non-mineral under some other law; nor,
 - (b) Warrant an official declaration, expressed or implied that the lands had previously been adjudged non-mineral under some other act of Congress, within the operation of which mineral lands are included.

6. The Land Department cannot gain jurisdiction of known or unknown mineral lands, which are excluded by special act of Congress from the jurisdiction derived from that special act, by erroneously adjudicating in the exercise of that jurisdiction, that such lands are not mineral lands because they are not known to be mineral lands.
7. Revised Statutes Nos. 441, 453, 2478, only authorize the Land Department to administer each act of Congress according to its own provisions. Those sections do not authorize that department to transfer the provisions of one act of Congress into another act, nor to import into their proceedings, had wholly under one act, authority derived from other acts, and not derivable from the act under which alone they are proceeding, and so to gain jurisdiction of which they are expressly deprived by the act under which they are proceeding.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. I. LAMPRECHT and
F. M. AIKEN, Trustees, Appellants,
Petitioners,
vs.
SOUTHERN PACIFIC RAILROAD
COMPANY,
KERN TRADING AND OIL COM-
PANY, and T. S. MINOT, Appellees,
Respondents.

No. 2028
In Equity

BRIEF ON BEHALF OF PETITIONERS.

This brief is on a petition for certification of a question of law to the Supreme Court, under Section 239 of the Judicial Code. The question petitioned to be certified is:

Does not the provision: "Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this Act * * *" as the same is contained in the Special Act of Congress, approved July 27, 1866, expressly withhold from the officers of the Interior Department, who administer it and the Joint Resolution approved

June 28, 1870, and the grant made thereby, all power and authority to determine conclusively and adjudicate, in any proceedings under said Act and Joint Resolution, what lands are and what lands are not mineral lands?

This Court heretofore certified, on its own motion, to the Supreme Court, in this cause, seven questions of law. The opinion of the Supreme Court thereon, including its answers to those questions, which is made a part of the petition, shows conclusively that, in preparing the opinion and in answering the questions, that Court inadvertently ignored the necessary legal effect of the clause: "that all mineral lands be, and the same are hereby, excluded from the operations of this Act * * *," as it is contained in the granting Act. The result of this inadvertence is, that the Supreme Court answered questions 1, 2, 3, 4, 6, 7, as if "all mineral lands" were only excepted from the grant created and defined by the granting Act, and were excluded only from the grant, and were not in addition thereto, excluded expressly, *in praesenti*, by Congress, in and by said granting Act, from all of the operations thereof; which operations include every phase of every authority derivable from said granting Act.

Such inadvertence of the Supreme Court has placed this Court in such position that it must, under the answers to the questions, and under Section 239 of the Judicial Code, do one of three things:

1. Adjudge in this cause that all mineral lands, which are expressly excluded from the operations of the granting Act, are included within the operations of that Act; or,
2. Certify the above question to the Supreme Court and let that Court either relieve this Court of the necessity of entering such judgment, or explain how things excluded from other things are included within the things from which they are excluded; or,
3. This Court should explain by what authority mineral lands are included within the operations of the granting Act.

For the sake of clearness, the questions heretofore certified are here stated, with the answer of the Court to each question, and the answer which the Court would have been obliged to make to each question, if it had interpreted properly and applied to the case the mineral land exclusion clause contained in the statute.

Questions and Answers.

“1. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

Answer.—Mineral lands, known to be such at or prior to the issue of patent, were not included in the grant but excluded from it, and the duty of de-

termining the character of the lands was cast primarily on the Land Department, which was charged with the issue of patents."

The Correct Answer.—No, the grant was created *in praesenti* and defined by the special granting Act. The statute is both the instrument of the grant and the law thereof. It vested in the grantee title to all lands granted by it, and none other, upon the definite location of the road, as this Court has repeatedly held, Wisconsin R. R. Co. v. Price Co., 133 U. S. 496, 507; St. Paul, Etc., v. Northern Pacific, 139 U. S. 1, 5; Deseret Salt Company v. Tarpey, 142 U. S. 241, 247; Schulenberg v. Harriman, 21 Wall. 44, 60; Leavenworth, Lawrence, Etc., v. United States, 92 U. S. 733; Missouri, Kansas, Pacific Railway v. Kansas Pacific Railway, 97 U. S. 491; Railroad Company v. Baldwin, 103 U. S. 426; and mineral lands, whether known or unknown, are excepted from the grant and excluded *in praesenti* from the operations of the Act which authorized the issuance of the patents prescribed in it. Barden v. Northern Pacific, 154 U. S. 288, 314-316, 326-331.

"2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Answer.—A patent issued in such circumstances is irregularly issued, undoubtedly so, but as it is the act of a legally constituted tribunal and is done within its jurisdiction, it is not void and therefore passes the title (Noble v. Union River Logging Railroad, 147 U. S. 165, 174-175), subject to the right of the Government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued. McLaughlin v. United States, 107 U. S. 526; Western Pacific Railroad Co. v. United States, 108 U. S. 510.”

The Correct Answer.—No. All mineral lands known and unknown are expressly excluded *in praesenti* in the granting Act from its *operations*, which include every phase of its authority. They are, therefore, excluded from the authority of the officers to determine or adjudicate their character in proceeding wholly under that Act, because in every such proceeding all their authority is derived from that special Act, and they cannot import into such proceedings under it authority derived from other statutes, and which is not derivable from the special granting Act.

“3. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Answer.—The mineral land exception in the patent is void.”

The Correct Answer.—No. The mineral land excepting and excluding clause contained in the patent does not except and exclude any mineral lands from

the grant. They were all excluded and excepted from the grant by the granting Act, and that clause in the patent is only notice for record of such exception and exclusion. The Land Department has not power to enlarge the grant created and defined by the granting Act, or to alter the definition of the grant, so as to include any mineral lands, whether known or unknown.

“4. If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

Answer.—It is conclusive upon a collateral attack.”

The Correct Answer.—The patent which contains the mineral exception and exclusion clause is a conclusive and official declaration of all matters appearing upon its face and is not subject to collateral attack by any one. All mineral lands, whether known or unknown, were excluded from the jurisdiction of the Land Department in the proceedings wherein the patent issued. It is a record importing absolute verity of the act of issuing it, which amounted to an official declaration that all requirements preliminary to the issuance thereof had been properly complied with.

“5. Is petroleum or mineral oil within the meaning of the term ‘mineral’ as it was used in said acts

of Congress reserving mineral land from the railroad land grants?

Answer.—Petroleum lands are mineral lands within the meaning of that term in railroad land grants.”

The above answer is correct.

“6. Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

Answer.—It does.”

The Correct Answer.—Yes, it would, if he were attacking the patent. But he is not attacking it. He is simply insisting that the patent is valid, according to its terms and import. Neither the granting Act nor the patent purports to convey any mineral lands, known or unknown, and they are not evidence of any title thereto in the grantee named therein. The Land Department can derive no jurisdiction from the granting Act to do anything whatsoever in respect to mineral lands. The patent was regularly and not erroneously issued.

“7. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title

to such of the lands described in the patent as were in fact mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Answer.—No; such an agreement is of no greater force as an estoppel than the exception in the patent. The latter being void, the patent passes the title, and is not open to collateral attack or to attack by strangers whose only claim was initiated after the issue of the patent.”

The Correct Answer.—Yes, such an agreement would be a mutual and correct interpretation of the granting Act and of the patent issued thereunder, which in form and import complies with the provisions of that Act.

To show that the above questions should be answered as indicated it is necessary only to establish the following

Argument.

I.

THE SPECIAL PROVISION OF THE GRANTING ACT “THAT ALL MINERAL LANDS BE, AND THE SAME ARE HEREBY, EXCLUDED FROM THE OPERATIONS OF THIS ACT * * *” EXCLUDES ALL MINERAL LANDS WHETHER KNOWN OR UNKNOWN, FROM THE JURISDICTION OF THE LAND DEPARTMENT IN ALL ITS PROCEEDINGS HAD WHOLLY UNDER THAT ACT.

The Supreme Court, in its opinion and answers to the questions, made no distinction between the effect of merely excepting lands “reserved, granted,

sold, etc.'', from the grant, and both excepting "mineral lands" from the grant, and in addition thereto, excluding "all mineral lands" *in praesenti*, from the *operations* of the granting Act.

It is very evident that in excepting eight distinct classes of lands from the grant created by the granting Act, and excluding only one of those eight classes from the operations of the Act, Congress intended that such exclusion should have some effect other than and beyond the effect of the exception. The effect of the exception of the lands from the grant would be to authorize the officers of the Land Department to segregate the lands excepted from the lands granted, in their administration of the grant. The Court held such to be the duty of the Land Department in respect to mineral lands. The Court expressly states that they must segregate mineral lands in the same manner as they segregate lands "reserved, sold, granted, etc." (Opinion 25-26). And the Court expressly states on page 15 of its opinion:

"in this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such distinction."

Of course, it will be conceded that such assertion by the Court will not alter the truth if valid reasons for such distinction exist. Some reasons for such distinction will now be noted.

The circumstances and contingencies against which Congress must provide, in order to retain

title to lands "reserved, granted, sold, etc.", were entirely different than those against which it must provide in order to retain in the Government title to "all mineral lands". Lands "reserved, sold, etc.", constituted seven of the eight classes excepted from the grant. All lands falling within any of those seven classes are excepted from the grant, because some claim or right attached to them, prior to the definite location of the line of the road by the filing of the map thereof in the General Land Office. The making of a record in the Land Office was absolutely necessary to the creation and existence of every claim which could bring any lands within any of these seven classes of excepted lands. Therefore, officers of the Land Department could sit in their offices, at Washington, and by examination of their plats and records, segregate accurately every acre of land falling within any of these seven classes of excepted land. There was not the slightest excuse for any mistake in doing this work.

But what were the circumstances and contingencies against which Congress was under necessity of providing to keep the title of all mineral lands in the Government? Was there any record of all mineral lands? Did the circumstance that they were mineral depend upon the making of a record in the Land Office? The country through which this grant passes was then almost entirely unexplored. No one knew what lands were mineral and what lands were not mineral. The segregation of the mineral lands, within the limits of this grant, could be successfully

accomplished only after a most careful exploration, to accomplish which years and the development of the country would be required. The granting Act required patents to be issued as fast as the road was completed. It is evident that mineral lands could not be accurately segregated from the non-mineral lands before the patents must issue. Congress added, to the exception of the mineral lands from the grant, the exclusion of them from the operations of the Act, in order to prevent the passage of title from the Government of such of the mineral lands as would pass under the exception by an erroneous decision as to their character. This is the only possible explanation of the addition of the exclusion clause to the exception of the lands from the grant. The fact this grantee is now claiming title to an empire of mineral wealth under this granting Act, because of an alleged erroneous adjudication that they were non-mineral demonstrates the wisdom of Congress in inserting the exclusion clause in the granting Act.

Such being the reason for *excluding* "all mineral lands" from the *operations* of the Act, in addition to *excepting* "mineral lands" from the *grant*, what is the necessary effect of excluding them from the *operations* of the Act? What are the operations of an Act of Congress?

An Act of Congress is the authoritative determination of the legislative mind in respect to a subject of legislation. It is a law established by the Act of the legislative power. The Act operates so

long and only so long as it is a law. The operations of this Act are its workings; its processes of action; its performances and procedure; everything it does; its force and effect; its results. These synonyms of the word "operation" denote various phases of the authority of the Act. The plural of the word "operations", used in the statute, includes all of the various phases of the authority of that Act of Congress. These definitions and synonyms of the word "operation" are taken from the Standard Dictionary; they are also given in the dictionaries of the date of the granting Act. This granting Act is a law. The Courts have carefully defined the operations of a law.

In *State v. Greebrick*, 5 Iowa, 491, 496, the Court defines the word "operation" as used in Article 1, Section 6, of the Constitution of Iowa, providing that all Acts of a general nature shall have a uniform operation, to mean: "the practical working and effect of the laws".

In *United States v. Hammond* (U. S.), 26 Federal Cases, 96, 98, the Circuit Court for the District of Columbia, in construing the acceptance, by the United States, of the grant of the District of Columbia, which provided that the operation of the laws of the State within such district should not be affected by the acceptance until the time fixed for the removal of the Government thereto, and until Congress should otherwise by law provide, said:

"A law is always in operation as long as it is the rule of conduct of the subject upon which it is intended to operate; that is, as long as the

subject is bound to obey it, or to conform his conduct to its provisions. The operation of a law can be nothing more than the obligation of a law. The law ceases to operate when it is no longer obligatory, and as long as it is obligatory, it is in full operation. The law would not cease to operate upon citizens of a State, although it should happen that there was neither a Court, a judge nor an officer of justice to punish a breach of such laws. There is a vast difference between the operation of the laws and the execution of the laws. A law may be in operation, and yet, from a defect of courts or officers of justice, it may not be possible to carry it into execution. The operation of a law is a part of its very existence. It ceases to be a law when it is no longer operative."

The obligation of the law is its binding force and effect, which is the same thing as the authority of a law. Hence, from these definitions and authorities and the use of the plural of the word "operation" in the exclusion clause of this granting Act, the irresistible conclusion is, that Congress intended to and did exclude all mineral lands *in praesenti* from every phase of the authority derivable from the granting Act.

The purpose of this is evident. Mineral lands were at the date of this grant nearly all unknown. They were reserved from every form of sale and disposition until the 26th day of July, 1866, one day before the granting Act was approved. Congress knew that nearly all of these mineral lands were unknown, and that they would remain unknown for years and years to come, and until long after the patents must be issued under this granting Act, and

so excluded them from the operations of the Act. Is the fact that they were unknown a reason for including them? If mineral lands were only excepted from the grant, that would oblige the officers to segregate them, a thing which Congress knew those officers could not do. To meet this difficulty Congress excluded these lands, whether known or unknown, from the *operations* of this Act, which operations include every phase of every authority, which the Land Department can derive from the granting Act. Therefore, those lands are excluded from all jurisdiction of the officers of the Interior Department, derivable from that Act. When those officers administer the grant, they have, in their administration of it, only the authority of the special Act which made the grant and authorized the issuance of patents under it.

The Court insists that it is a *duty* of those officers, created by the granting Act, to segregate the lands granted from the lands not granted, and to include only non-mineral lands in the description of the patent. This is true of lands "reserved, sold, granted, etc.", because they are only *excepted from the grant*, and *are not* excluded from the *operations* of the Act, which it is asserted creates the duty to segregate. The answer to that assertion is that every such *duty* created by the granting Act is an *operation* thereof, and all mineral lands are, therefore, excluded from that *duty* and from the *exercise* of it, which is also an *operation* of that Act. Every *authority* created and every *duty* imposed by this

Act is one of its *operations*, and mineral lands are not subject to such authority; and such duty can have no application to any of them.

On page 10 of its opinion, the Court cites Rev. Stat., Secs. 441, 453, 2478, and the case, Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166, 167, to support the proposition that these sections authorize the officers of the Land Department to determine the character of mineral lands, in a proceeding under this special granting Act, and to segregate such lands from the lands granted. Such contention overlooks the fact that each Act of Congress granting lands for some specific purpose must be administered according to its own provisions, and not according to the provisions of some other Act, which Congress has passed for some other purpose, or according to the provisions of some Act which Congress has not passed, but which some executive officer or court *believes* Congress *ought to have passed*. To refrain from adjudicating the character of mineral lands is as much a part of the proper administration of an Act of Congress from the operations of which all mineral lands are excluded, as to adjudicate the character of mineral lands is a part of the proper administration of an Act of Congress within the operations of which mineral lands are included.

When the Land Department administers the homestead laws, they are bound, in their administration of them, by the provisions of those Acts of Congress. When they administer the mineral-land

laws, they have power only to carry the authority of those laws into effect. When they administer the town-site Act, they are bound by the provisions of that Act, in all their proceedings under it, and can derive no authority from any source other than the statute. They cannot change any of the provisions of these Acts. This contention, that the officers of the Interior Department are clothed with a "general authority" by virtue of which they can administer a grant of lands made by a special Act of Congress so as to disregard an express provision of the granting Act, and interpolate into the statute, in its place, another provision meaning exactly the opposite of the one disregarded, is puerile. Executive officers have not the power under the Constitution so to amend the Acts of Congress. It is certainly true that the officers of the Interior Department have authority to administer the public land laws, but this does not mean that they can import into their proceedings, under this special granting Act, authority derived by them from other Acts, which provide for the granting of land for other purposes, and so gain authority and power to adjudicate and determine under this special granting Act, the mineral character of mineral lands when the very Act under which they are proceeding deprives them of all power and authority to determine and adjudicate that question under it. If those officers were permitted so to import authority from one statute to another, they could transfer, under any statute, any lands which they could transfer under any or

all other statutes. The result would be that Congress, who are entrusted, under the Constitution, with exclusive and plenary power and authority over the public lands, would have no authority over them at all. Yet, the Court's opinion quotes and cites cases arising under laws within the operations of which mineral lands are included and in which it was held that those statutes authorize an adjudication of the character of mineral lands, to prove that the officers must also determine and adjudicate the character of mineral lands by the operations of an Act of Congress from all of the operations of which all mineral lands are excluded. Such ruling is erroneous.

There are other considerations which prove conclusively that this exclusion clause removes all mineral lands from the jurisdiction of the Land Department in a proceedings under the granting Act. These considerations can best be noticed by an analysis of the case of *Barden v. Northern Pacific Railroad*, 154 U. S. 288. That case is an absolute authority in this case. The application of its principles to this case would absolutely force a judgment in favor of the appellants.

That case arose under the granting Act of July 2, 1864 (13 Stat. 365). The provisions of that Act are identical with those of this, in so far as they relate to the subject here under consideration. When the Northern Pacific granting Act was in the House for consideration, the Public Lands Committee of the House inserted into it by way of amendment the ex-

clusion clause practically as it appears in this Act. When the bill passed and went to the Senate, it was referred to the Public Lands Committee of the Senate, who reported it with amendments, two of which were as follows:

“After ‘land’ in Line 8, to insert ‘not mineral.’” Another amendment—the fifth—was to strike out the following provision in Section 3:

“Provided further that all mineral lands be, and the same are hereby, excluded from the operations of this Act, and in lieu thereof a like quantity of unoccupied and unappropriated, agricultural lands, nearest to the line of said road, may be selected as above provided.”

Congressional Globe, Part 4, First Session,
38th Congress, Senate, page 3290.

The bill as amended was passed by the Senate and returned to the House. The House refused to pass the bill as amended. The Senate appointed a conference committee and instructed it to insist upon the Senate’s amendments to the bill. (Id. 3360.) The House appointed a conference committee. (Id., page 3388.) The committees met in conference and reported back the bill in the present form of the statute. (Id., page 3479.) These records show unmistakably that Congress knew and intended that the exclusion clause would and should have the effect of removing these lands from the jurisdiction of the Land Department *in a proceeding wholly under* the granting Act.

There is one other thing which should be noticed before analyzing the Barden case. It is claimed

that that case is distinguished from this case by the fact that the joint resolution of January 30, 1865, (13 Stat. 567), adds something to the exclusion of mineral lands from the operations of the granting Act.

First, the joint resolution provides "that no *Act* passed", etc., "*shall be so construed* as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the *Act* or *Acts* making the grant." Not only is there no difference between the excluding force and effect of this joint resolution and the excluding force and effect of the exclusion clause in the granting *Act*, but the history of the joint resolution shows conclusively that it was intended to have precisely the same effect as the excluding clause. This resolution was before the 38th Congress, at the First Session, but for some reason was not reported back to the House after it had been passed by the Senate.

Second, the record shows that this resolution was before Congress at the same time that the bill which made the grant to the Northern Pacific was being considered. That granting *Act* was approved July 2, 1864.

Congressional Globe, Part 4, First Session, 38th Congress, June 28, page 3339, we find the following:

"RESERVATION OF MINERAL LANDS.

Mr. HENDRICKS. I am directed by the Committee on Public Lands, to whom was referred the joint resolution (H. R. No. 99) *reserving*

mineral lands from the operation of all Acts passed at the present session granting lands or extending the time of former grants, to report it without amendment, and I ask for its present consideration.

There being no objection, the Senate as in Committee of the whole, proceeded to consider the joint resolution which provides 'that, no Act passed at the present session of Congress, granting lands to States or corporations, to aid in the construction of roads or for other purposes or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States.'

Mr. DOUGLAS I should like this resolution to define exactly what are called mineral lands, otherwise, it will make very great difficulty in our legislation.

Mr. HENDRICKS. The Senator asks why the Committee on Public Lands do not define what is meant by 'mineral lands' in the sense in which it is used here. The Committee favored the resolution as a practical measure. There have been no grants made *this winter*, in which the reservation has *inadvertently been omitted*, except upon a proposition making a grant of land in the region of *Lake Superior*, and there there are no minerals except *copper* and *iron*. It was thought best to *except them* from all grants made in that region of the country."

In the Congressional Globe, Part 1, 2nd Session of 38th Congress, page 360, we find the following:

"MINERAL LANDS.

Mr. HARLAN. A few days before the close of the last session, a joint resolution (H. R. 99) 'reserving mineral lands from the operation of all Acts passed at the present session, granting lands or extending the former grants' was

passed by the Senate, but through some inadvertence was not sent back to the House of Representatives, so that it failed to become a law. In order to secure the object now, some amendments are necessary which I am authorized by the Committee on Public Lands to propose; and to reach that stage I move first to reconsider the vote by which the joint resolution was passed.

The motion was agreed to, and the resolution amended by striking out the words 'present session' and inserting the words 'first session of the 38th Congress' and adding to the resolution 'unless otherwise expressly provided in the Act or Acts making the grant'." (The title was also amended.)

Three things are apparent from this record:

1. That the joint resolution of January 30, 1865, was not intended to apply to the Northern Pacific granting Act, for the reason that Congress considered the exclusion clause thereof as effective as the joint resolution, itself, "reserving mineral lands from the operations of all Acts, etc.", supra.
2. The resolution was intended to apply to some particular grant on the shores of Lake Superior, from which inadvertently mineral lands had not been excluded. The record so states.
3. The joint resolution was before Congress at the same time that the Northern Pacific granting Act was before it, and, if Congress had not considered the exclusion clause of the Northern Pacific granting Act as broad and effective as the joint resolution, it would have changed that granting Act by amendment. This is also shown by the fact that

in making the grant now under consideration, Congress copied exactly the language of the Northern Pacific granting Act with reference to the exclusion of mineral lands and added no new provision. The record says:

“There have been no grants made this winter, in which the reservation has inadvertently been omitted, except upon a proposition making a grant of lands in the region of Lake Superior, and there there are no minerals except *copper* and *iron*. It was thought best to except them from all grants made in that region of the country.”

Iron is not a mineral within the meaning of the Northern Pacific granting Act, hence, this resolution could not have been intended to apply to it to reserve iron and copper in the upper peninsula of Michigan. Nothing could be clearer, both from the language of the resolution and of the record of its consideration, that it has no more force than the excluding clause now under consideration to remove mineral lands from the jurisdiction of the Land Department. So the Barden case differs in no respect whatever from the case at bar, as to the law which governs the title to mineral lands.

That case was presented to the Supreme Court on writ of error, by the defendants who were claiming under the mineral-land laws to reverse judgment against them in the lower Court on demurrer to the complaint of the railroad company in an action of ejectment. The company claimed the lands under its granting Act, alleging that they were not

"known" to the mineral until after the road was definitely located, built, examined by the Commissioners, approved and accepted as constructed in compliance with the granting Act. The disputed lands, which were within the primary limits of the grant, had been selected by the company, listed with the local Land Officers, and by them certified to the Commissioner of the General Land Office. The lands had been surveyed. After all these things had been done, but while the issuance of patent was delayed, citizens discovered mineral on the excluded lands, and located them under the public mineral-land laws. It was admitted that the lands were in fact mineral. No patent had issued. Such were the admitted facts of the Barden case.

The question of law presented to the Court was whether the railroad company or the mineral claimants were entitled to possession of the land, and to acquire title to it. The inquiry of the Court naturally was narrowed to the questions:

1st. The inclusiveness of the phrase, "all mineral lands".

2nd. When the mineral character of mineral lands should be finally determined and adjudicated.

3rd. By whom and by what authority this decision should be made.

The railroad company insisted that only lands *known* to be mineral at some definite "point of time" in the proceedings under the Act, were thereby "excepted from the grant", and that such time

was when the grant attached by the filing of the map of the definite location of the line of the road. The railroad company admitted in that case, as follows:

“1. The whole question turns upon the definition of mineral lands. It is only lands ‘not mineral’ which are granted by the Act. No mineral lands can pass by it” (page 305).

The mineral claimants insisted that only lands known to be mineral at the time of the issuance of the patent were excepted from the grant, and that the issuance of a patent including unknown mineral lands included them within the grant, which was created and defined by the statute, which conveyed the title at the date of the definite location of the road, as of the date of the granting Act.

The Court decided:

1. That Congress excluded mineral lands from the operations of the granting Act to remove any doubt of the intention to confine the concession to non-mineral lands (page 312).

2. That the joint resolution of January 30th, 1865 (13 Stat. 567), “cut off every possible suggestion by way of ingenious and strained construction, that mineral lands might be reached under legislation giving vast tracts of public lands to states and corporations, under pretense of aiding public improvements” (page 312).

(As we have seen, the legal effect of the resolution to exclude was the same as the excluding clause in the granting Act.)

3. That the ascertainment of the section specified in the statute, in no respect affected

the nature of the lands or the conditions on which the grant was made (page 313).

4. It was still, as such grant (a present one), subject to the exception of mineral lands made at its date or then excluded therefrom by conditions annexed (page 313).

5. The exception of mineral land was "declared in the creation of the grant" (page 313).

6. The other exceptions "in no respect affected that one or limited its operation".

7. The exception of mineral lands *cannot be limited by inference* from any language in the statute "*in the face of its declaration that all mineral lands are thereby 'excluded from its operations'*". And the joint resolution of January 30th, 1865, is to the same effect (page 314).

8. Congress had power to create and did create, by the granting Act a title which by its very nature and definition could not attach to any mineral lands, whether known or unknown (314, 315).

9. In no decision of the Supreme Court "was it ever pretended that the ascertainment of the location of the lands granted operated to withdraw from the grant the reservation of mineral lands then undisclosed." The grant did not exist without the exception of minerals therefrom (page 316).

10. The grant is limited to lands not mineral at the time of grant, and was coupled with the condition of the statute, that all mineral lands are excluded from its operations (316).

11. Mineral lands were not conveyed, but were by the statute and resolution reserved to the United States and excepted from the operations of the statute (page 316).

12. Mineral lands "were not to be located at all, and if in fact located they could not pass under the grant" (page 316).

13. Mineral lands are absolutely reserved from the inception of the grant (page 316).

14. The word “known” cannot be inserted in the Act of Congress by construction, “either to limit the extent of its grant or the extent of its mineral” (page 317).

15. “To change the meaning of the Act is not in the power of the plaintiff, and to insert by construction what is expressly excluded is in terms prohibited” (page 317).

16. The omission of the word “*known*”, as defining the extent of the mineral lands excluded, was purposely intended (page 317).

17. “It is impossible to admit that Congress intended that its exclusion of mineral lands should be defeated” (page 318).

18. The Act of Congress does not provide that selections of the lands by the plaintiff, as part of its grant, shall in any respect change its purpose and effect and eliminate any of its reservations; nor does it empower the officers of the local Land Office to accept the list as conclusive with respect to such grant in any particular (page 321).

19. The Court then distinguishes Deffenback v. Hawke, 115 U. S. 392, and Davis v. Weibbold, 139 U. S. 507 (pages 322-324).

As these rulings of the Court seem to dispose completely of every question of law presented by the record in the Barden case, no patent having issued, all written in the opinion in respect to the effect of the issuance of a patent, is *obiter*, unless it is construed to apply to some matter before the Court on the record. It may, however, be advantageous to consider even this alleged *obiter* carefully, because it was intended to point out a “means by which

and a time at which" the character of mineral lands within the limit of the grant could be conclusively determined. That case was twice argued and decided by a divided Court. There should be no *obiter* in the opinion. In considering the opinion, however, certain things should be constantly kept in mind.

The controversy being considered by the Court in that case was, as in that case, between claimants under the granting Act and claimants under the mineral-land laws. The railroad company was insisting that the officers of the Interior Department *had no authority*, under the facts of that case, to determine, on application *under the mineral-land laws*, that the lands were mineral and therefore "excepted from the grant"—the lands having been certified for patent by the local Land Office. On the other hand, the mineral claimants and the Solicitor General were insisting to the contrary, and also that those officers had authority to determine conclusively and adjudicate the mineral character of mineral lands *in a proceeding wholly under the railroad's granting Act* up to the issuance of patent, and not afterwards, and that such adjudication was conclusive in the absence of fraud.

It was not necessary for the mineral claimants, in that case, to show more than an *exception* of mineral lands from the grant. The strenuous argument of the railroad company on "the uncertainty in the titles of the country", which would result from the "exception of unknown mineral lands

from the grant" seemed to render it expedient for the mineral claimants not to call the Court's attention to the fact that, all mineral lands were not only excepted from the grant but were, in addition thereto, excluded from the *operations of the Act*, which rendered impossible the adjudication of their character by the operations of that Act. Such argument was, in that case, not only unnecessary, no patent having issued, but it would strengthen the argument of the railroad company on the uncertainty of titles and might induce the Court to interpolate into the statute the word "known" as limiting the "exception of mineral lands from the grant". On the other hand, the railroad company evidently feared to show the legal effect of this excluding clause to strengthen its argument on uncertainty of title, because a proper interpretation and application of it would put them out of Court instanter and establish a rule which would forever bar them from obtaining title to coveted mineral lands, under their granting Act, by any means. So, this exclusion clause was so thoroughly disguised in sophistry that it resembled an "exception". The discussion of the effect of a patent in the opinion in the Barden case, read with these circumstances in mind, is easily understood. It begins on page 326, where the Court says:

"We do not think any apprehension of disturbance in titles from the views we assert need arise."

"The views we assert", it must be remembered are that unknown mineral lands are excepted from

the grant and therefore not granted, and are excluded from the operations of the Act, and therefore, "if in fact located cannot pass under the grant"—"mineral lands" being absolutely reserved from the inception of the grant.

It cannot be assumed that the opinion in the Barden case was written about some imaginary case and not in respect to the rights and interests of the parties to the controversies before the Court. What the Court has to say in that opinion relative to the effect of a patent is readily understood if confined strictly to the controversy between the parties then before the Court. If not so confined, it seems to be *obiter dictum*, and inconsistent at that, with the provisions of the statute and with the other parts of the opinion of the Court and parts of it inconsistent with other parts. There have been so many different constructions placed upon this portion of the opinion, that it seems best to give it some careful attention to determine the exact import of it, although the task may be tedious.

At page 226, the Court says that the contention of the plaintiff arises from an unfounded apprehension that the Court's interpretation of the granting Act would lead to great uncertainty in titles of the country, and "we do not think that any apprehension of disturbance in titles from the views we assert need arise".

"The law (not the granting Act) places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting

the disposition of public lands of the United States and the adjustment of private claims to them *under the legislation of Congress*" (Rev. Stat., §§ 3441, 453, 2478).

That sentence was certainly written in regard to the claims of the litigants then before the Court, and the Court proceeds to state how their controversy can be settled before the Land Department:

"It can *hear contests* and decide upon the respective merits of their claims. It can *investigate* and *settle* the *contentions* of all persons with respect to such claims. It can *hear evidence* upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can *issue to the rightful claimant* the *patent provided by law*, specifying that the lands are of the *character* for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, agricultural lands or mineral lands, and designate them in the patent which it issues."

It would be difficult indeed for one to describe more accurately the duties of the Land Department in a contest between private parties over public lands sought to be entered under different Acts of Congress. The Court says they can investigate, settle contentions, hear evidence, determine the character of the lands, issue the patent to the party entitled to it and specify the character of the land in the patent. The Court is answering the contention of the railroad company, which was that no mineral lands could pass under the grant, and that therefore mineral lands must be so defined as not

to include unknown mineral lands, but the Court does not state, nor is this language open to the inference that, the *granting Act* confers authority for the determination of the character of mineral lands. The opinion continues:

“The Act of Congress making the grant to the plaintiff provides for the issuance of a patent to the grantee for the land claimed, and as the *grant excludes mineral lands in the direction for such patent to issue*, the Land Office can examine into the character of the land and designate it in its conveyance.”

This was written in reply to the argument of the railroad company, that the officers of the Land Department had no authority to determine that the land in controversy was mineral land and to patent it to the mineral claimants under the mineral-land laws, because the patent, to which the railroad company was absolutely entitled, whatever its form and import, was due to be issued before the land was known to be mineral land. The Court says that the grant (granting Act) “excludes mineral lands in the direction for the patent to issue”, and gives this as a reason why the officers have the power to hear the contest between the railroad company and the mineral claimants, and to award the land to the railroad company if it is shown to be non-mineral, and to the mineral claimants if it is shown to be mineral. But the Land Department is, in that contest, clothed with the authority of the mineral-land laws because one of the contestants is proceeding under those laws. It

is true that the fourth section of the Act excludes mineral lands in the direction for the patent to issue, because it provides for the issuance of patents "as aforesaid" *confirming "the right and title* to said lands situated opposite to and co-terminous with said completed section of said road", and that "patents shall be issued to said company *conveying* the additional sections of land *as aforesaid*". (In quoting this fourth section of the statute, the advance sheets of the Supreme Court omit the word "as" before the last-quoted "aforesaid", which changes the entire meaning of the sentence by making the word "aforesaid" modify "sections" instead of modifying the participle "conveying".) Thus the fourth section provides that the patent shall conform to the grant, and shall convey, as the granting Act conveys, excluding all mineral lands. As all mineral lands are excluded from the authority of the granting Act, they are excluded from the authority of the officers to patent them, or to determine their character, or to do anything whatsoever about them *in a proceedings wholly under the granting Act*. The land in controversy was admitted to be mineral land. "The Land Office can examine into the character of the land, and designate it in its conveyance."

Continuing, the Court says:

"It is the established doctrine expressed in decisions of this Court that wherever Congress has provided for the disposition of any portion of the public land of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertain-

ment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack."

To support this proposition the Court cites and quotes from Smelting Company v. Kemp, 104 U. S. 636, 640, 641, and Steele v. Smelting Company, 106 U. S. 447, 450, both of which cases arose in respect to conclusiveness of patents issued under the mineral-land laws. These cases were cited and quoted from in reply to the railroad company's argument, page 305, et seq., that the Secretary of the Interior had no authority of law to determine conclusively the character of mineral lands within the concession created by the statute. The very circumstance which made it possible for the railroad company to advance this argument was that all mineral lands were excluded from the *operations* of the Act which deprived the Secretary of the Interior of all authority or jurisdiction over mineral lands, in a proceedings wholly under the granting Act. The Court had already held on pages 313, 314:

"Whatever the location of the sections and whatever the exceptions then arising, there remained that original exception (of mineral lands) declared in the creation of the grant. The location of the sections and the exceptions from other causes *in no respect affected that one*, or limited its operations. There is no language in the Act from which an inference to that effect can be drawn *in the face of its*

declaration that all mineral lands are thereby excluded from its operations, and of the joint resolution of 1865, etc.”

The Court holds in this passage that the exclusion of mineral lands from the operations of the Act precludes all *implication* from any language in the Act that any mineral lands are within any authority derivable from the Act.

Again, after distinguishing *Deffeback v. Hawke*, supra, as a case in which the statute excluded only known mineral lands from the power to acquire title, the Court said, in the *Barden* case, page 323:

“But that case has no bearing upon the present one involving the construction of an Act of Congress declaring in express terms, that *no mineral lands* shall be conveyed by the grant made.”

Also, after distinguishing *Davis v. Weibbold*, supra, as a case in which the terms “mine” and “valid mining claim” included only lands known, at the date of sale, to be mineral, the Court says, page 324:

“There is a marked distinction between that case, under the town-site law, and the present case, under a grant of Congress, excluding mineral lands from its operation although it is conceded that some of the language used (in *Davis v. Weibbold*) is broader than the necessities of the case required. Yet, the *effect given to the town-site patent* will be found not inconsistent with the views hereafter expressed in the present case.”

It will be noticed that in these passages the Court uses the word “grant” and the word “Act” inter-

changeably, and the point upon which the cases are distinguished is that they were cases in which only *known* mineral lands were removed by the statute from the power of the grantee to acquire the land, while in the Barden case, *all* mineral lands were removed by the statute from *every* power or authority derivable from it.

To continue analysis of the latter portion of the opinion in the Barden case: the Court points out on pages 327, 328, that the character of the disputed mineral lands can be determined in a contest between the parties before the Land Department, under the mineral-land laws, because under those laws the department has jurisdiction to determine whether the lands are or are not mineral lands. The fact that the defendants were claiming the lands in controversy under the mineral-land laws would, in a contest, between them and the railroad company clothe the Land Department with the authority of those laws. They were the only laws under which any lands within the grant could be claimed after the map of definite location was filed.

The Court then cites and quotes from *Heath v. Wallace*, 138 U. S. 573, 585, to show that the decision of the department "upon matters of fact *within its jurisdiction* are, in the absence of fraud or imposition, conclusive and binding upon the courts of the country". Then the Court says in the next sentence:

"If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or

because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are accepted because they are mineral lands. It has always exercised its jurisdiction in patenting lands, *which were alleged to be mineral*, or in refusing to patent them because the evidence was insufficient to show that they *contained minerals* in such quantities as to *justify the issue of the patent.*"

Will any one assert that the Court meant, by this passage, that lands alleged to be mineral were to be patented to the railroad company, or that patents were to be refused the railroad company because the evidence was insufficient to show that they contained mineral? The Court is pointing out that the character of mineral lands can be determined in a contest before the department, and that if the department determines, by authority of the mineral-land laws, that they are non-mineral, it can patent them to the railroad company. The Court then cites and quotes from *Knight v. Land Association*, 142 U. S. 161, to show that the Land Department has authority under laws within the operations of which mineral lands are included, to eliminate them from the lists filed by the railroad company under its granting Act. Then the Court continues:

"There are undoubtedly many *cases arising before the Land Department* in the disposition of the public lands where it will be a matter of much difficulty on the part of the officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral

or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

It is perfectly clear from this portion of the opinion that the Court was speaking of a determination of the character of the lands in a contest before the Land Department. The Court was answering the contention of the railroad company in the Barden case, that as the granting Act excluded mineral lands from its operations, they were removed from the authority of the Land Department, and that a definition must be given by the Court to mineral lands which would not include unknown mineral lands, in order that "a point of time" might be fixed at which the grant would attach to mineral lands then unknown to be mineral (see pages 305, et seq.). The Court says that these matters must be determined under the mineral-land laws, which Congress enacted with provisions suitable for the determination of the character of mineral lands, and the Court cites and quotes from Central Pacific Railroad Company v. Valentine, 11 Land Decisions, 238, 246, which was a contest case between mineral claimants and the railroad company, to show that the Land Department had jurisdiction under the mineral-land laws, in such contest, to adjudicate the character of mineral lands, and that such adjudication, and a patent issued thereon, would stop the Government.

Then the Court says:

"It is true that the patent has been issued in many instances without investigation and consideration which the public interest require; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them."

This language is not open to the inference that the Court meant that the character of mineral lands should be adjudicated by the operations of the granting Act, from the operations of which they are excluded expressly in that Act.

The Court continues:

"The fact remains that *under the law* the duty of determining the character of lands granted by Congress and stating it in the instruments transferring the title of government to the grantees, reposes in the officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it *will not comply* with the Act of Congress in which the grant before us was made to plaintiff."

The insistence of the Court, that the character of the land must be stated in the patent, arises from the fact that the Land Department is a special, inferior tribunal, having limited jurisdiction under the various statutes, and nothing is presumed in favor of this jurisdiction. It is not a court of gen-

eral jurisdiction and no presumption can arise that it has adjudicated the character of mineral lands in a proceedings under an Act from the operations of which mineral lands are excluded; nor can any presumption arise, from the issuance of patent, under such Act, that the department has adjudicated, under some other Act, that the lands are non-mineral. Hence, the Court insists that the character of the lands, as non-mineral, must be stated in the patent to the railroad company. The principles of law which govern these matters are discussed and explained in *Grignons v. Astor*, 43 U. S. 319, 340-341, where the Court says:

“The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and whose proceedings are nullities if their jurisdiction does not appear on their face is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to final judgment, without setting forth in its proceedings the fact and evidence on which it is rendered, whose record is absolute verity not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection beyond the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities.”

The same matter is discussed in *Voorhees v. Bank of United States*, 10 Peter, 473, 474-475, and

in Wilcox v. Jackson, 13 Peter, 498, 511. In the latter case the Court says:

"The principle upon this subject is concisely and accurately stated by this court in the case of Elliott et al. v. Peirsol et al., 1 Peters, 340, in these words: 'where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed is regarded as binding in every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable but simply void'."

It is apparent from these authorities that it cannot be presumed that the officers of the Land Department have determined and adjudicated that the lands in controversy in this case are non-mineral, or that the issuance of the patent is a determination that they are non-mineral, in the face of the fact that mineral lands are excluded from the operations of the granting Act under which the patent was issued; and in the face of the fact that the patent does not state that the lands are non-mineral; and in the face of the fact that the mineral lands exception and exclusion clause is contained in the patent.

Now, to continue with the analysis of the opinion in the Barden case, the Court says:

"The grant even when all the Acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by the officers of the Land Department, charged with

its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the offices of the department, would be conclusive in subsequent proceedings respecting the title."

To have this effect, the patent must be "in proper form, upon a judgment rendered after due examination". This language was written by the Court concerning the lands in controversy before it. They were claimed by the railroad company under its grant, and by the defendants under the mineral-land laws. The Court was pointing out that the Land Department had authority in a contest between these parties to issue a patent in proper form upon a judgment rendered in such contest, in which the officers were clothed with the authority of the mineral-land laws, and that such determination and patent thereon would estop the government from contending that the lands were mineral lands, if the determination was that the lands were non-mineral and patent issued thereon to the railroad company. The last quotation above closes the Court's discussion of that subject with one exception. The next paragraph of the opinion is as follows:

"The delay of the Government in issuing a patent, of which great complaint is made, does not affect the power of the company to assert in the meantime, by possessory action (as held in *Deseret Salt Company v. Tarpey*, 142 U. S. 241), its right to lands which are in fact non-mineral. But such delay, as well observed, can-

not have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein."

The "opportunity" referred to here is the "due examination" mentioned in the previous paragraph. The examination due this subject is that provided for by the mineral-land laws, which specify the procedure for the determination of the character of mineral lands. The "declaration in the patent, which would be taken as its determination, that no mineral lands exist therein," refers to the judgment rendered in a contest according to the rulings of the Court in the previous paragraph of its opinion. The necessity of stating the non-mineral character of the lands in the patent arises from the fact that the Land Department is a special tribunal, having limited jurisdiction, inferior in the technical sense, and therefore the issuance of a patent under the granting Act, from the operations of which mineral lands are excluded, could raise no presumption that a decision has been rendered by that department, under some other Act, within the operations of which mineral lands are included, that the lands described in the patent are non-mineral.

Now, the paragraph last above quoted contains a direct statement by the Court, that in the absence of an *opportunity* to have the land sufficiently explored to determine its character, an exception of mineral lands should be included in the patent. Had not the Court already stated in its opinion in this very case, and cited its previous opinions to show that, in every case where the statute, under which a patent is issued, either expressly or by implication authorizes the Land Department to determine whether the lands are mineral or non-mineral, the issuance of the patent is a determination that the lands are of the character authorized by the statute to be patented? Will anyone assert that the Court was ignorant of this principle, when it stated in its opinion, in the Barden case, that the mineral exception clause *should be inserted in the patent* in the absence of an adjudication that the land described therein was non-mineral, and in absence of a statement to that effect in the patent? If it is conceded, as it must be conceded, that the Court was not then ignorant of that principle, then it must also be conceded that the Court held in the Barden case, that the officers of the Land Department derived no authority from the granting Act to determine or adjudicate the character of mineral lands in a proceeding had wholly under it. There is no escape from this conclusion. To assert to the contrary would be to accuse the Court of writing in one of the most important opinions it ever rendered, six pages of pure *obiter dictum*,

about some imaginary case not before it on the record, and to say that both such *obiter*, and such inconsistency of it, escaped the notice of the Court in that case, which was decided by a divided Court. Surely, if the granting Act authorized the officers of the Land Department to determine the character of mineral lands, then, they would have no right to insert such exception clause in the patent issued under it. Surely the Court knew this when it wrote in its opinion the paragraph last above quoted. This shows conclusively that the Court held deliberately in that case that all mineral lands were excluded from the jurisdiction of the Land Department under the granting Act.

A careful examination of the opinion in the Barden case reveals that the Court held in it:

1st. That the phrase "all mineral lands" in the exclusion clause of the granting Act includes unknown mineral lands.

2nd. That the mineral character of mineral lands within the limits of the grant must be determined and adjudicated under and by authority of the mineral-land laws, within the operation of which they are included and which specify the procedure for determination of their character, and not by authority of the granting Act, from the operations of which all mineral lands are excluded.

3rd. That the mineral character of these mineral lands shall be determined and finally adjudicated in the first instance by the Land Department, whenever the question of their character arises in a proceedings under the mineral-land laws. And that the decision must

be stated in patents to the railroad if the lands are adjudged non-mineral.

4th. That until such determination and adjudication is had, under the mineral-land laws, patents issued under the granting Act should contain a clause excepting and excluding mineral lands.

Such construction of the opinion renders each part of it entirely consistent with every other part, and entirely consistent with the express provisions of the granting Act, from all of the operations of which "all mineral lands" are expressly excluded. The rulings in the opinion of the Barden case cannot be harmonized with the assertion that the granting Act authorizes the Land Department to adjudicate the character of mineral lands in a proceeding had wholly under it; nor can such assertion be harmonized with the express provision of the granting Act which excludes all mineral lands from its operations.

The railroad company has two stock objections which it urges against the above construction of the granting Act. They are briefly:

1. That such construction would deprive them of their lieu lands.
2. That such construction would necessitate the exception of all lands "reserved, sold, granted, etc.", in the patent which would leave the grant entirely unadministered.

As the Supreme Court has adopted these arguments in favor of the railroad company, although

they are without foundation, it is necessary to examine them briefly. It is claimed that the provisions of the Act for selection of other lands, in lieu of mineral lands, renders imperative the adjudication of the character of mineral lands, prior to the issuance of the patent, in order that the grantee's opportunity to exercise this right of lieu selection may not be lost by the appropriation, under other laws, of all land which the railroad company might otherwise select in lieu of mineral lands. This is urged as a reason for requiring the Land Department to adjudicate the character of mineral lands by the operations of this special granting Act, from the operations of which all mineral lands are expressly excluded by the Act, itself. Of course, the argument is not usually stated so clearly as it is stated here, but the limitations of the granting Act required the above statement of it for accuracy.

It is strange that such arguments should mislead any one. The circumstance that the opportunity of lieu selection will surely be lost to the grantee, if it does not ascertain *what lands are mineral*, and makes its selections in lieu thereof, as a condition of the grant created by valid limitations of the granting Act. It is, therefore, a valid limitation of the grant. Is that a reason for regarding it as an extension of the grant, or as a reason for extending the grant, against the positive provisions of the Act which expressly withdraws authority from the Land Department to adjudicate the

character of mineral lands, in a proceedings had wholly under it, through which adjudication alone the grant can be so extended? This right of lieu selection is only a *right*, the same as the right of any citizen to locate and claim land under an Act of Congress. This right of selection does not become a vested right until it attaches to the land by its lawful exercise. These railroad grantees, who have profited so enormously by the Government's beneficence, are the only citizens in the United States, who have ever claimed to be injured because the Government does not point out to them what lands they may and what lands they may not select. They have the same right as other citizens to have the mineral character of mineral lands determined under the mineral-land laws. They have had more reason than other citizens to bestir themselves in this regard, for by locating the mineral lands within the limits of their grant, and acquiring title thereto under the mineral-land laws, they could establish their right to select other lands in lieu thereof under the granting Act. They do not seek equality before the law, but seek the special privilege of obtaining title to mineral lands by the operations of an Act of Congress, from the operations of which all mineral lands are excluded, in order that they may avoid the expense of developing the land as required by the mineral-land laws, and hold the lands under the granting Act, contrary to the policies of those laws. It is alleged and admitted in this case that the railroad com-

pany has known, since before the patent issued, that the lands here in controversy are mineral lands. It has no right to complain of loss of lieu selections.

The argument that the above construction of the granting Act, and the Barden case would necessitate an exception in the patent of all lands "reserved, sold, granted, etc.,," and leave the grant unadministered, is also without foundation. The granting Act only excepts from the grant lands "reserved, sold, granted, etc." They are, therefore, within the operations of the granting Act, and the officers have authority, derived from the granting Act, to segregate those lands from the lands granted. This authority was given them for the reason, that under the provisions of the granting Act, the records of the Land Office would enable them to segregate such excepted lands accurately. All mineral lands were excluded from the operations of the Act, and thereby withheld from the authority of the officers of the Land Department to segregate them from the lands granted, under that Act, because nearly all the mineral lands were unknown, and Congress knew, therefore, that they could not be accurately segregated, before the patents must issue under the fourth section of the Act. They cannot be included because they were unknown. Congress excluded them for that very reason.

As the Supreme Court has cited and quoted from *Davis v. Weibbold*, 139 U. S. 507, in this case, to show that the Land Department must adjudicate the character of mineral lands by authority of the

granting Act, it becomes necessary to analyze that case carefully. It was between plaintiff claiming land under patent of a mining claim, dated January 16, 1880, and defendant claiming the same land by mesne conveyance under a townsite patent, dated September 26, 1870. The record did not show when the mineral location was effected, nor whether there was a mine on the land at the time the townsite patent issued. The townsite statute contained the provision:

“Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and the necessary use thereof,”

and contained another provision:

“No title shall be acquired” under its provision, “to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing law.”

It is apparent that the clauses above quoted exclude lands falling within the definitions of the terms “mine” and “valid mining claim” from the power of citizens who acquire them under the townsite law. In that case the Supreme Court adjudged that the terms “mine” and “valid mining claim” included only known mineral lands. The language of the opinion shows that the Court appreciated the fact that a mine is mineral land from which mineral in paying quantities is extracted, and that a valid mining claim is mineral land, which has been located

under the mineral-land laws. Therefore, the thing excluded from the power of acquisition in that case was *known* mineral land (pages 517, 526).

Now, what was the *effect of the exclusion* of such lands on the power of the officers, under the town-site law, to transfer the land excluded? The opinion in that case is susceptible of but one construction, viz.:

1. That as the townsite patent was issued prior to the mineral patent, the burden of proof was upon the mineral claimant to show that the land was *known* mineral land at the time the townsite patent was issued, in order to bring the land within the exclusion of mines and valid mining claims from the power to transfer land by authority of the statute (pages 525, 526).

2. That this might be shown by evidence that the land had been worked as a mine or located under the mineral-land laws as a mining claim, prior to the issuance of the townsite patent (pages 526, 528).

3. That if sufficient evidence of this kind had been produced to prove that the land was known mineral land, because it was within the definition of the term "mine" or "valid mining claim" when the townsite patent issued, then the townsite patent could convey no title, because such proof would reveal that the lands were excluded from the authority or jurisdiction, operation of the townsite law (page 526).

4. That in such case the later patent, issued under the mineral-land laws would convey the title (pages 526, 527).

5. That the defendant claiming under the townsite patent could submit evidence "to prove that at the time the patent to the Butte townsite was issued to the probate judge, the

premises embraced by the Gold Hill lode were not known to be valuable for minerals of any kind," and the reason for the right to prove this was: "the question was not whether there were valuable minerals at the time the (mineral) patent was issued, but whether such minerals were known to exist within the premises at the date of the townsite patent to the probate judge" (page 527).

It will be noticed that the lands which fell within the definition of those excluded from the authority to convey were removed from the jurisdiction of the Land Department under the statute which so excluded them, and that, therefore, it was relevant and material to prove that the lands were within those definitions *at the time the townsite patent issued.*

What becomes of the theory, under a statute which excludes the lands in controversy from its authority, that a patent issued, by its authority, is a conclusive determination that all lands included within its description are of the character authorized by that statute to be patented? If such is the law of such an Act of Congress and of the decisions in Deffeback v. Hawke, and Davis v. Weibbold, how then does it happen that the patent issued to the probate judge, September 26, 1877 (page 512) was not a conclusive determination that all the lands included therein were not *known* mineral lands when that patent issued? And how does it happen that the mineral claimant was permitted under the opinion of the Supreme Court in that case to show both

in the Interior Department and in the courts, that the lands included in the townsite patent were *known*, at the time it issued, to be mineral lands, and were not, therefore, conveyed by the townsite patent? Could he show this if the issuance of the townsite patent was such conclusive determination and adjudication? If the issuance of the mineral land patent was a conclusive determination, upon more mature consideration, that the lands were known to be mineral at the time the townsite patent issued, then, how does it happen that the defendant could show that they were not *known* mineral lands when the townsite patent issued? Does the Supreme Court hold in that case that the mineral patentee could attack the townsite patent collaterally? If so, why? Just how did the Court reconcile its holdings in *Davis v. Weibbold*, *supra*, with its earlier decisions in *Smelting Company v. Kemp*, *supra*, and *Steele v. Smelting Company*, *supra*, which are cited by the railroad company and by the Court in this case to show the conclusiveness of the railroad company's patent? The Court clears up the whole matter and answers all these questions in a single paragraph by saying:

“They (patents) are conclusive in such actions of all matters of fact, necessary to their issue, *where the department had jurisdiction to act upon such matters, and to determine them*; but if the lands patented were not at the time public property, having been previously disposed of, or *no provision had been made for their sale, or other disposition*, or they were reserved from sale, the department

had no *jurisdiction* to transfer the lands, and their attempted conveyance would be void no matter with what seeming regularity the forms of law have been observed."

Now, which one of these circumstances was it which removed the lands there in question from the power of the Land Department to convey them? It was the fact that the townsite statute made no provision for the sale or disposition of known mineral lands, but on the contrary forbade acquisition of title to such lands under the townsite law. All of the discussion of the Court in that case concerning known and unknown mineral lands was only to the point that the terms "mine" and "valid mining claim" were inclusive of only known mineral lands. The Court did not hold in that case that the townsite patent was good and conveyed the title, if the lands were known mineral lands at the time it issued. It held exactly the contrary, as the opinion shows, although it may appear otherwise from a single quotation from the opinion. The fact that mineral lands could be conveyed under the mineral-land laws was not held to authorize their conveyance under the townsite laws. The townsite patent was not conclusive that the lands were not known mineral lands when it issued.

The railroad company and the Supreme Court do not hold that known mineral lands were not excluded from the jurisdiction of the Land Department under the townsite law in that case, but they assert that only lands known to be mineral at the

time the patent issued under that statute were so excluded and affected; which is true, and from this, they assert that only lands known to be mineral, at the date of the patents issued under the granting Act here in question, are excepted from the grant, and they deny that they were thereby removed from the jurisdiction of the Land Department to convey them in a proceedings under that granting Act. But, the exclusion clause removes known and unknown mineral lands from that jurisdiction. And how and why can the description or definition or nature of the things excluded change the legal effect of the exclusion on the authority of the Land Department over them in a proceeding under the Act from the operations of which they are excluded? The Supreme Court adjudged in *Davis v. Weibbold*, *supra*, that such exclusion of *known* mineral lands deprived the Land Department of jurisdiction over them under the Act from the operations of which they were excluded, and that, therefore, those officers had no power to convey known mineral lands under that Act, whether the department knew they were known mineral lands or not. Would notice in the patent of this restriction in the statute be void? Would it limit or restrict the grant?

Now, the Supreme Court held in case of *Barden v. Northern Pacific*, *supra*, that all mineral lands were excluded from the operations of the granting Act, whether they were known or unknown to be mineral, and that the knowledge or lack of knowledge of the officers in respect to their mineral char-

acter was not intended by Congress to limit their exclusion or define the grant. Therefore, all mineral lands known and unknown are excluded from the jurisdiction of the officers of the Land Department in a proceedings under the granting Act. Are not those mineral lands, whether known or unknown, the same lands they were when Congress so excluded them? Has anyone changed the granting Act so as to include them? If so, who? Neither the nature nor the extent of the things excluded can affect in any way the legal effect of their exclusion.

II.

PUBLIC MINERAL LANDS KNOWN AND UNKNOWN ARE INCLUDED WITHIN THE OPERATIONS OF ACTS OF CONGRESS WHICH AUTHORIZE THE LAND DEPARTMENT TO GRANT ONLY NON-MINERAL LANDS BY PATENT AND CONTAIN NO SPECIAL PROVISIONS OTHERWISE LIMITING THE JURISDICTION OF THE LAND DEPARTMENT TO NON-MINERAL LANDS.

The general statutes, which authorize the Land Department to grant only non-mineral lands by patent, require that department to convey a full and unconditional title to all lands so granted. The creation of such grants necessitates a prior determination that the lands granted are non-mineral. It is, therefore, a duty of the department, created by such statutes, to adjudicate the character of lands applied for. In order to do this properly that department must have the lands examined by some-

one, ascertain the facts concerning them,—whether they contain mineral, if so, the nature, condition and extent of deposits—and from such facts determine whether the lands are or are not mineral lands. They refuse to grant them, or grant them upon the application, as the findings warrant. To refuse to grant the lands, because they are found to be mineral, is just as much the final official act of the proceedings on the application as is the issuance of a patent upon the findings that they are non-mineral. It would be just as reasonable to say that non-mineral lands are not within the operations of such statutes, because the officers cannot rightfully refuse a patent upon proper application and findings that they are non-mineral, as it would be to say that mineral lands are not within their operations because the officers cannot rightfully issue a patent for them upon the findings that they are mineral. To refuse to grant lands on an application and a finding that they are mineral is just as much an official declaration that they are mineral, as to grant them on an application and a finding that they are non-mineral is an official declaration that they are non-mineral. Therefore, in all proceedings under such Acts of Congress, mineral lands are just as much subject to the operations of those Acts as are non-mineral lands; under all the definitions of the term “operations” when used in respect to the authority of an Act of Congress, it includes every phase of power or authority derived from the Act, every duty imposed by it, every obligation it creates,

every right it bestows—even the right to apply for patent under an Act of Congress is an operation of that Act. The operations of an Act of Congress include all of the various phases of its authority and their practical workings and effects. For the same reasons, the public mineral-land laws include within their operations non-mineral lands.

Some Acts of Congress, which authorize grants by patents, contain special provisions intended to remove mineral lands from some particular authority, duty, obligation or right created by the Act, and so to affect some particular phase of the Land Department's jurisdiction over mineral lands. For instance, the townsite laws provide that "no title shall be acquired" to any "mine" or "valid mining claim". This provision was held in *Davis v. Weibbold*, supra, to deprive the Land Department of power to convey the lands included within the definitions of those terms. Whether it deprived the Land Department of jurisdiction to determine whether the land was within or without those definitions is questioned. This power to convey is an operation of the Act. The placer mining law provides that an applicant for patent under it shall be deemed not to have applied for a lode which was known to exist within the limits of his placer claim at the date of his application, unless he mentions such lode specially in his application. This provision excludes the lode so known from the *application* in which it is not specially mentioned, and so removes it from all jurisdiction of the Land Department in proceedings on the appli-

cation. The right to apply for the patent and the applications are operations of that Act. The Supreme Court has held that this provision requires an exception of known lodes in the patents (*infra*). The provision of the joint resolution of January 30, 1860, that "no Act, etc., shall be construed to include mineral lands" excludes mineral lands from the granting authority or operations of the Acts to which it refers, and so excludes them from those grants. It also excludes mineral lands from the authority of those Acts by which any Court or officer might decide that mineral lands passed by such grants, which authority is also an operation of the Acts to which the resolution refers. That resolution also provides that mineral lands are thereby "reserved exclusively to the United States" from the Acts of Congress to which the resolution refers. This provision removed mineral lands so reserved from all authority derivable from those Acts. As shown above, this joint resolution was intended to have and has exactly the same effect *as to the lands reserved by it* as the exclusion clause in this granting Act, in respect to the lands excluded by it from all of the operations of the granting Act.

None of these special provisions, in Acts which authorize the department to grant lands by patent, are as broad and effective as this excluding clause in the granting Act which excludes all mineral lands, both known and unknown, from all of the operations of the granting Act. This special excluding

clause, in the granting Act, reaches every phase of the jurisdiction of the Land Department, in respect to all mineral lands, whether known or unknown, in every proceeding had wholly under that special granting Act. It excludes all mineral lands from every operation—authority—of that Act. It leaves the title of those lands in the Government unaffected, just as they would be if the Act had never been passed. They are, by the Act itself, forever removed and excluded from all and every power, authority, duty, obligation and right, express or implied, created by or derivable from that Act by anyone. To deny this is to contradict the express provision of the statute. A court, in holding to the contrary, violates this express excluding clause of the Act of Congress, and assumes to include all mineral lands within the operations of that Act from all of the operations of which Congress has expressly excluded them. It is not within the lawful power of courts to hold by implication that a statute provides as they think it ought to provide, in respect to the disposition of public lands, when the statute expressly provides otherwise. The equity jurisdiction of courts do not go to that extent in respect to a subject matter over which Congress has, under the Constitution, exclusive and plenary authority to legislate.

These observations are a complete answer to the statement of the Supreme Court's opinion (page 15, Advance Sheets), that in respect to the conclusiveness of patents: "no distinction is recog-

nized between patents issued under railroad-land grants and those issued under other laws; nor is there any reason for such distinction". The distinction is that, in this railroad-land grant Act, there is a special provision, in addition to the exception of the mineral lands from the grant, not found in general statutes, which excludes all mineral lands from the operations of the Act, which created the grant and authorized the issuance of patent, and thereby removes all mineral lands, whether known or unknown, from the jurisdiction of the Land Department derived from that special statute. If the Court had recognized this distinction, its rulings in this case would have conformed to this provision of the granting Act, instead of contradicting it.

III.

**THE MINERAL LAND EXCEPTION AND EXCLUSION CLAUSE
CONTAINED IN THE PATENT DOES NOT EXCEPT AND
EXCLUDE MINERAL LANDS FROM THE GRANT, BUT IS
ONLY NOTICE FOR RECORD THAT THE GRANTING ACT,
WHICH CREATED AND DEFINED THE GRANT, AND VESTED
IN THE GRANTEE TITLE TO ALL LANDS GRANTED BY IT,
EXCEPTS ALL MINERAL LANDS FROM THE GRANT AND
IN ADDITION THERETO EXCLUDES THEM, WHETHER
KNOWN OR UNKNOWN, FROM THE JURISDICTION OF THE
LAND DEPARTMENT IN THE PROCEEDINGS WHEREIN THE
PATENT WAS ISSUED.**

The ruling of the Supreme Court in its opinion in the case at bar, that this exception and exclusion clause contained in the patent is void, is sought to be supported by the decisions in *Davis v. Weib-*

bold, *supra*; Cowell v. Lammers, 21 Fed. 200; Deffeback v. Hawke, *supra*; Shaw v. Kellogg, 170 U. S. 312, 337, 341, 343, supplemented by the departmental decision; Samuel W. Spong, 5 L. D. 193; Courtwright v. Wisconsin Central Railroad Company, 19 L. D. 410; Re Northern Pacific Railroad Company, 32 L. D. 342, and the decision in Sullivan v. Iron Silver Mining Company, 143 U. S. 441. In all of these decisions by the Supreme Court, except that in Shaw v. Kellogg, *supra*, the case arose concerning a patent which created a grant under authority of a general statute which authorized the Land Department to grant lands. In all of those cases, the statute required the Land Department to grant by patent an unrestricted and unconditional title to the lands applied for, or to grant no title at all. Necessarily, therefore, any attempted by that department to grant a restricted or conditional title, evidenced by a patent containing an excepting or restricting clause was a violation of the provisions of the Act of Congress by authority of which they created the grant by issuance of the patent. Hence, it was held in Deffeback v. Hawke, *supra*, and in Davis v. Weibbold, *supra*, that the Land Department had no authority or power under those Acts—the mineral-land laws—to insert such restrictive and conditional clauses in the patent. Their powers to create and define the grant were given and defined by the Act of Congress under which they were proceeding. Will anyone assert that the power of Congress to create and define such restrictive grants was

defined and limited in any such manner, when it created this grant by the granting Act? If not, then the conditional and restrictive grant, which it so created, is perfectly effective. That the title so defined was not known to the common law is of no importance, for Congress is a law-making body. The same lack of power in the Land Department to change or override the Acts of Congress under which they were proceeding, when they issued the patents in question in those cases, prevents them from changing this granting Act and the grant made thereby, and from including in the grant mineral lands, which Congress expressly excepted from the grant and excluded from the authority of the granting Act. The reason given by the Court in *Davis v. Weibbold*, supra, for holding the exception clause in the patent invalid was, that the officers could not override the Acts of Congress, and

“insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion, *they could limit or enlarge their effect without warrant of law.* The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged or diminished by any reservation of the officers of the Land Department, resting for their fitness only upon the judgment of those officers”.

Now, it is also true in respect to the grant created and defined by this special granting Act, that

nothing which those officers can do can change the grant made by that Act of Congress. Patents issued under it carry such rights to the land included in the odd sections not "reserved, sold, granted, etc.,," as the law confers and no others, and those rights can neither be *enlarged* or diminished by any action of the officers. This grant never existed without its exception of mineral lands. The granting Act never existed without its exclusion of all mineral lands from its operations. It is no more within the power of the Land Department to enlarge the grant by eliminating these exceptions and exclusions, than it was in their power in those cases to restrict the title. The exclusion clause of the granting Act removes mineral lands from its jurisdiction. The same reasoning applies to the case of *Sullivan v. Iron Silver Mining Co.*, supra, where it was held that "the exception of the statute cannot be extended by those whose duties it is to supervise the issuance of the patent". Nor could they enlarge the grant made by patent under the placer law to include known lodes, by assuming to determine that no known lodes existed within the limits of the claim. Why? Because, known lodes not specially applied for were excluded by the statute from the application which was an operation of that law, which exclusion removed such lodes from their jurisdiction. No more could they eliminate the exception, made *in praesenti* in the granting Act of Congress which created this grant, especially when the granting Act excluded

from all of its operations and therefore from all of their jurisdiction the lands so excepted and excluded.

The case of *Shaw v. Kellogg*, *supra*, was one in which the grant was made *in praesenti* by an Act of Congress, which also directed the officers of the Land Department to supervise the location of the land, and to conduct the proceedings which vested the title. That Act simply granted "lands, not mineral", and contained no provision *excluding* mineral lands from the *operations* of the Act. Therefore, although mineral lands were *excepted* from the *grant*, they were *included within the operations* of that Act, just as much as non-mineral lands, although the duties of the officers in respect to mineral lands, under the authority of that statute, was very different than their duties in respect to non-mineral lands. That case is not, therefore, an authority for the proposition that mineral lands are included within the operations of an Act of Congress, from the operations of which "all mineral lands" are expressly excluded, by the Act, itself. In that case, mineral lands were within the jurisdiction conferred by the statute upon the officers; in this case all mineral lands, known or unknown, are excluded by the statute from the jurisdiction of the officers under it.

The Supreme Court has in its opinion in this case cited three departmental decisions as authority for the proposition, that the exception and exclu-

sion clause contained in the patent, is void and of no effect, for want of authority of law to insert it. Before examining these alleged authorities, it will be advantageous to note some facts, evidenced by the books containing the decisions. Counsel has secured 19 L. D., the book in which Courtwright v. Wisconsin Central, *supra*, is reported, and also 32 L. D., in which the case Re Northern Pacific Railroad Company is reported. The logic of the decisions contained in these books led counsel to ascertain as best he could from the books, just how authoritative these decisions are, before assuming to criticise them. On page III the following statement is found:

"OFFICE OF THE ASSISTANT ATTORNEY-GENERAL.

The decisions of the Secretary of the Interior, relating to public lands, are prepared in the office of the Assistant Attorney-General for the Interior Department, under the supervision of that officer, and submitted to the Secretary for his adoption."

19 L. D. contains decisions from July, 1894, to December, 1894. It has an index of 240 cases reported in it, and an index of 102 cases overruled and modified. "(From Vol. 1 to 19, inclusive.)" 32 L. D. has an index of 254 cases reported, and an index of 258 cases overruled and modified. "(From Vol. 1 to 32, inclusive.)" This volume includes decisions from January, 1903, to May, 1904. It is evident from these facts printed in these books, that at the time these decisions were rendered and the opinions written, the legal talent

of that department was pretty bad, but was rapidly becoming better or worse, and at the rate at which they are progressing in this regard, it is only a question of time when they will have all of their important decisions overruled or modified, and courts who adopt these land decisions as authorities will soon be in serious difficulties.

In *Courtwright v. Wisconsin Central*, *supra*, to put the matter tersely, it is held that the Interior Department lost jurisdiction over mineral lands by the operations of an Act of Congress, from the operations of which, those lands were excluded. In other words, that they had lost jurisdiction of the lands applied for by the issuance of a patent in a prior proceedings, wherein they had no jurisdiction over those lands, and notice of such lack of jurisdiction is given in the patent which they had issued. This decision is claimed to be based on the authority of the decision of the Supreme Court in *Barden v. Northern Pacific*. But the writer of the opinion, conveniently stops quoting from the opinion in the Barden case when he reaches the paragraph in which the Court stated that the exception and exclusion clause should be inserted in the patent in the absence of an express finding under the mineral-land laws that the land was non-mineral.

It appears in the decision, *Northern Pacific Railroad Company*, 32 L. D. 342, that the proceedings in which that decision was rendered, were entirely

ex parte, in other words, the Northern Pacific Railroad Company wrote a letter to the Land Department requesting that the exception clauses be left out of the patents issued under its grant, and the legal staff, who prepare these opinions, on December 10, 1903, decided that there was no authority for the insertion of this clause in the patents "and directions are given that in *all* future railroad land-grant patents, the excepting clause be excluded". Nobody interested in these matters outside of the railroad company was given an opportunity to be heard. To show how this thing was accomplished, a few extracts from the opinion are quoted:

"All mineral lands, other than coal and iron, are *excluded* from the Northern Pacific land *grant*, whether known or unknown at the time of the attachment of rights thereunder, either by definite location or selection. *Barden v. Northern Pacific Railroad Company*, 154 U. S. 288".

Who, then, has changed the statute?

This passage conveniently overlooks the facts that all mineral lands, whether known or unknown, are excluded from the *operations* of the Act, which created the grant, and that they are therefore excluded from the grant, in addition to being excepted therefrom; and that such exclusion removed all mineral lands, whether known or unknown, from the jurisdiction of the Land Department in a proceeding had wholly under the granting Act. The next heading of the opinion is:

"Who shall determine the character of the land within the limits of a railroad grant?"

To show that the character of mineral lands should be determined by the Land Department, in a proceeding under the granting Act, from the operations of which all mineral lands are excluded, the writer of the opinion cites and quotes from Litchfield v. Register and Receiver, 9 Wall. 575, 577; Steele v. Smelting Company, 106 U. S. 447, 450, 455; Burffening v. Chicago, St. Paul, etc., 163 U. S. 321, 323; Northern Pacific Railway Company v. Sanders, 166 U. S. 620, 635; Barden v. Northern Pacific, *supra*, 328, 329; McCormick v. Hayes, 159 U. S. 332; Davis v. Weibbold, *supra*, and Deffeback v. Hawke, *supra*.

Litchfield v. Register and Receiver, *supra*, was a case in which a mandate was sought to control the actions of the Register and Receiver. The Court held that official action could not be controlled in that manner, because it involved the exercise of judgment and discretion in determining whether lands applied for, were subject to disposition or sale upon the application.

Steele v. Smelting Company, *supra*, was a case arising in respect to a patent issued under the mineral-land laws. The author of the opinion in *Re Northern Pacific* evidently believed that he could transplant the authority of the mineral-land laws into the special granting Act, and exercise it in a proceedings under that special Act, and so gain

authority to convey mineral lands, which are excluded from the jurisdiction of the Land Department in such proceedings by an express provision of that special granting Act.

Burffening v. Chicago, St. Paul, etc., *supra*, arose in respect to a patent on soldiers' additional entry to islands in the Mississippi River, which were within the territorial limits of the incorporated City of Minneapolis at the date of the entry. The Act of Congress, under which the entry was made and the patent issued, contained a provision that lands within the limits of an incorporated city or town "shall not be subject to the rights of pre-emption" and homestead. The Court held in that case that such provision of the statute, excluded the lands in question from the *right of entry* under it, which is an operation of that Act, and that, therefore, both the entry and the patent were void and subject to collateral attack in the court of law. The portion of the opinion quoted in this land decision case to the effect that a patent is conclusive, is taken from that portion of the opinion in which the Court denied in Burffening v. Chicago, St. Paul, etc., *supra*, that the patent in that case was conclusive. Immediately after the part there quoted, the Court says:

"But it is also equally true that when by Acts of Congress, a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent,

transfers no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or *convey any public lands in disregard or defiance thereof.* Smelting Company vs. Kemp, 104 U. S. 636, 646; Wright vs. Roseberry, 121 U. S. 488, 519; Doolan vs. Carr, 125 U. S. 618; Davis vs. Admr. vs. Weibbold, 139 U. S. 705, 729; Knight vs. Land Association, 142 U. S. 161".

It will be noticed that in that case, the Court held that the lands which were excluded from the jurisdiction of the Land Department in the proceedings, wherein the patent was issued, could not be conveyed by the department, and that it was not the nature, extent or definition of the thing excluded, but it was the *exclusion* which deprived the department of jurisdiction. What is excluded must in each case be determined from the provisions of the statute. But the *effect of the exclusion* is always the same.

The author of this land decision case then quotes from Northern Pacific Railroad Company v. Sanders, *supra*, as follows:

"Whether the lands sought to be purchased as *mineral lands* were of that character was a matter for the determination, in the first instance, of the Land Department; and there was jurisdiction in that department to pass upon every question arising upon applications to purchase them as *mineral lands*."

That was a case in which lands claimed by the Northern Pacific under its grant had been located

as mineral lands. The Court held that their mineral character should be determined under the mineral-land laws. Is that any reason for holding that their mineral character could be adjudicated on an application under the granting Act, which excluded those lands from the operations of that Act?

This land decision then quotes from *Barden v. Northern Pacific*, *supra*, as follows:

“If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption, or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting *lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of patent.*”

The very passage thus quoted shows that the Court was saying that the character of mineral lands must be determined by authority of the mineral-land laws, because it had already held in its opinion in that case that they were excluded from all authority derivable from the granting Act. The writer of this land decision case, after the above quotations: “These cases clearly establish the jurisdiction of the Land Department in the premises”. But he does not state what the premises are. The decision is correct if the author means to say that the character of the mineral

lands within the limits of the grant must be determined by authority of the mineral-land laws, but the cases which he cites are not authority for the proposition that the Land Department can determine the character of mineral lands by the operations of the granting Act, from all of the operations of which all mineral lands are excluded by the Act itself. The author then quotes further from *Barden v. Northern Pacific*, *supra*, to show that the Land Department must determine the character of mineral lands within the limits of the grant, but fails to notice that the authority to determine their character is derived, according to the rulings in that case, from the mineral-land laws, and not from the granting Act, in a contest. He, also, conveniently stops quoting from that opinion when he reaches the point where the Court says, that, in the absence of a determination by authority of the mineral-land laws, that the land is non-mineral, the exception clause must be inserted in the patent. If he had quoted that paragraph also and then reflected that, according to the decisions he had already quoted, such exception clause could not be lawfully inserted in the patent, if the Land Department had jurisdiction, in the proceedings wherein the patent was issued, to determine the character of mineral lands, it would have been apparent to him that the presence of that paragraph in the opinion shows very clearly that the Court was holding that the granting Act furnished no authority to determine the character

of mineral lands, because all mineral lands are expressly excluded from the operations of that Act.

The writer of the land decision case then quotes from *Davis v. Weibbold*, *supra*, which we have already examined.

The author of this decision, *Re Northern Pacific Railroad Company*, does not quote a single case nor cite one which supports in the slightest degree his ruling that there is no authority for the insertion of the mineral exception and exclusion clause in the patent issued under that railroad-land grant Act, from the operations of which all mineral lands are expressly excluded. He simply clips out a few sentences from one opinion, then from another, and patches them together so they read well, if one does not examine the opinions from which he quotes. These officers seem to have no idea from what Acts of Congress their authority is derived in any particular proceeding. They seem to think they can exercise any authority derived from any Act of Congress in a proceeding under any other Act.

The opinion of the Court in this case, at page 17, quotes from a report from the Commissioner of the General Land Office for 1868. The quotation states that the affidavit of the railroad company is required to the effect that the lands "are not interdicted, mineral nor reserved lands, and are of the character contemplated by the grant". That and the lists are then examined and compared with the

plats and records of the Land Office, supposedly to determine whether the lists are free from conflicts shown on the records and plats. A record of a mining claim never appears on the records of the Land Office until entry—application for patent. Were these offices supposed to patent to the railroad company mining claims for which no patent had been applied for? Then to more effectually guard the matter, the mineral exception clause is included in the patent. The report then continues to state facts which show absolutely the impracticability of determining the character of mineral lands from those records and plats. If that report reveals anything, it reveals the very circumstances, in the administration of the grant, which induced Congress to exclude mineral lands from the operations of the granting Act. The affidavits, which the railroad company in fact filed, simply stated conclusions and no facts. Those affidavits state that the lands are not “interdicted mineral nor reserved lands”. There is no comma after the word “interdicted” in the affidavits. The Court calls attention to the fact that contests are allowed, in which citizens might prove the land mineral, and that the exception and exclusion clause was inserted “with an eye to future discoveries rather than to existing conditions,” and that the practice in the Land Office shows that the exception clause was not intended to take the place of an inquiry of the character of the land, or to dispense with determination of its character, and that its presence in the patent does not signify that no inquiry or determination

was had. All these speculations are in the face of the express provision of the granting Act, which deprived the Land Department of jurisdiction to adjudicate the character of these mineral lands in a proceeding under that Act.

The Court quotes and cites from the case of Samuel W. Spong, 5 L. D. 193, where it is held that the issuance of a patent under the granting Act was a determination that the lands were non-mineral. It does not appear in the report of that decision whether the patent in that case was issued upon a finding that the land was non-mineral under the mineral-land laws or not. If it was not, the decision contradicts the decision in the Barden case and contradicts the Act of Congress.

The placer mining law provides in effect that an applicant for patent to a placer mining claim shall be conclusively deemed not to have applied for lodes *known to exist* within the limits of his claim, at the date of his application, unless he makes special mention of them in his application. The Supreme Court has held that the Land Department is not only authorized, but is in duty bound, to insert this exception of known lodes in the patent.

Reynolds v. Iron Silver Mining Company,
116 U. S. 687, 697-698;

Iron Silver Mining Company v. Mike Starr,
143 U. S. 394;

Noyes v. Mantell, 127 U. S. 348, 353-354.

The reason for the insertion of the exception clause in these patents is that, by excluding such known lodes from the application, the Act of Congress deprives the Land Department of jurisdiction or power to transfer such known lodes, not specially applied for. If the Act of Congress had excluded in like manner "known and unknown lodes," whether applied for or not, the exception and exclusion of them in the patent would have been equally authorized. In those cases, the grant was created by patent. The Court holds that the exception clause in the *statute* created an exception of known lodes from the grant, and that such exception in the *patent* simply expresses the intent of Congress evidenced by the statute. For greater reason, the Land Department is authorized to insert the mineral land exception and exclusion clause in a patent issued under this granting Act by which Congress, itself, created the grant *in praesenti*, together with the exception of mineral lands from the grant and the exclusion of all mineral lands from the jurisdiction of the officers of the Land Department, in a proceeding under it. Especially is this true, since the granting Act vests the title in the grantees to all lands granted by it. It is not the function of the patent to define the nature and extent of the grant, nor to change in any respect the limitations thereof fixed by the statute. The fourth section of the granting Act specifies particularly *all that shall be done* before the patent issues, viz., 1. Twenty-five consecutive miles of road shall

be completed ready for operation; 2. The president shall appoint three commissioners to examine the same; 3. They shall examine the road and if it has been completed as required by the Act, they shall report the fact under oath to the proper officer, “and *patents* of lands, *as aforesaid*, shall be issued to said company, *confirming* to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road”, and when other twenty-five mile sections are completed, examined and accepted as above, “then patents shall be issued to said company *conveying* the additional sections of land, *as aforesaid*, and so on, as fast as every twenty-five miles of said road is completed, *as aforesaid*”. It is difficult, indeed, to perceive how Congress could have stated more clearly that the patent should conform to the grant made by the statute, in respect to the exception and exclusion of mineral lands, over which the Land Department has no jurisdiction under this Act. But the Supreme Court avoided seeing it by ignoring that the patents must be “*as aforesaid*” and saying:

“And so it was that provision was made for issuing patents ‘confirming to said company the right and title to said lands’ after construction” (Opinion, page 10).

This microscopic view of the statute excludes its provision that the patents shall be “*as aforesaid*”. Also, in quoting the fourth section of the statute on page 8 of the opinion, in the next to the last line,

the word "as" is omitted before the word "aforesaid". (Supreme Court, Advance Sheets, Opinion, page 8.) The omission makes the word "aforesaid" modify "sections", whereas in the statute the phrase "as aforesaid" modifies the participle "conveying". Therefore, by ignoring the first phrase "as aforesaid" by narrowing a quotation from the statute, and misquoting the second provision for patent by leaving out the word "as", the opinion of the Court misconstrues this Act of Congress.

The Act of Congress provides that the patent shall conform to the provisions of the statute, and that it shall convey the "sections of land" as the statute grants them, and mineral lands are excepted from the grant and excluded from the power of the officers to convey or adjudicate or to determine their character in a proceeding wholly under the granting Act. But the Court says that the Land Department must determine what lands are mineral lands and what lands are non-mineral in a proceedings under this statute, from the operations of which mineral lands are excluded, and then disregards those provisions of the statute which forbid the issue of a patent to conform to such construction. This was all done in the face of the fact that for fifty years the Supreme Court had consistently held that the principal office of the railroad-land grant patent is to furnish record evidence, that the grant has been earned by construction of the road and is not subject to forfeiture for breach of the

condition of the grant requiring its construction; and that the lands described in the patent are odd-numbered sections within the exterior boundaries of the grant and are situated opposite to and coterminous with the completed section of the railroad that has been accepted and approved.

Wisconsin R. R. Co. v. Price Co., 133 U. S. 496, 510;

St. Paul, etc. v. Northern Pacific, 139 U. S. 1, 6;

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 251;

Barden v. Northern Pacific, 154 U. S. 288, 324;

Wright v. Roseberry, 121 U. S. 488, 499;
Langdean v. Hanes, 21 Wall. 521.

Lands "reserved, sold, granted, etc.,," are only excepted from the grant, and the officers, therefore, have power to segregate them, but they have no power derived from the granting Act to segregate the mineral lands which are excluded from their jurisdiction under this Act, by an express provision thereof. The patents to be issued are to *confirm* the "right and title" created by the statute. They were not to change the "right and title".

In speaking of the decisions in St. Paul and Pacific Railroad Company v. Northern Pacific Company, *supra*, and Deseret Salt Company v. Tarpey, *supra*, in the Barden case at page 315, the Court said:

"In both of those cases, the writer of this opinion had the honor to write the opinions of this Court; and it was never asserted or pretended that they decided anything whatever respecting the minerals, but only that the title to the lands granted took effect with certain designated exceptions, as of the date of the grant, they never decided anything else. And what was that title? It was of the lands which at the time of the grant were not reserved as minerals, and of the lands which at the time of the location had not been sold, reserved, or to which a pre-emption or homestead right had not attached."

Such is the "right and title" to be *confirmed* by the patents and not changed. The fourth section of the Act, in providing for a patent "as aforesaid", conveying "as aforesaid" specifies a patent which would confirm the right and title created by the statute. The joint resolution of June 28, 1870, is to the same effect. Under it the Land Department could *save* "the rights of actual settlers", and the lands "granted, sold, reserved, etc.", by segregating them, by the records of the Land Office, because the lands affected by these exceptions are not excluded from the operations of the granting Act. They are only excepted from the grant. But, under that resolution, the officers were obliged to *reserve* the mineral lands in the patent, because under the granting Act, they had no power or jurisdiction over any mineral lands, whether known or unknown, because they are excluded by the granting Act from its operations or authority, in addition to being excepted by it from the grant created and

defined by that Act. The mineral-lands exception and exclusion clause, in the patent, is only notice of the exception and exclusion of mineral lands in the statute, and that the Land Department had no jurisdiction over those lands *in the proceedings wherein such patent issued*. How can such notice of a statutory limitation of a grant, which the officers who issued the patent *had no power to alter or eliminate*, be void? A ruling that it is void upsets, completely, the repeated rulings of the Supreme Court in all its decisions in cases arising under the placer laws, in respect to the exclusion of known lodes, and absolutely ignores the fundamental principle upon which those cases are decided. The Land Department was not required, under those Acts, to determine whether *known lodes* existed within the claims or not, before issuing the patent, although in all of those cases, the grant was created by the *patent*, which, it is claimed, should grant or not. The thing there excluded was a *known thing*, and no prior claim was necessary to its exclusion. What is the basic reason for that ruling? Simply this: Known lodes were excluded by the statute from the application in which they were not specially applied for. Therefore, they were not within the jurisdiction of the Land Department in a proceeding on the application under the statute; and, therefore, the Land Department had no power to determine whether they existed within the claim or not.

Now, in the case at bar, there is far greater reason, of exactly the same nature, for the insertion of the exception clause in the patent.

In this case “all mineral lands” known and unknown are expressly and directly excluded from all authority derivable from the granting Act, which created and defined the grant, *with its exception and exclusion* and vested the title. Why then is the Land Department obliged, under this granting Act, to determine and adjudicate the existence or non-existence of both known and unknown mineral lands, which are excluded from their jurisdiction, but included in the odd *sections* for which patent is required to be issued, while under the placer law they are not required to do so even in respect to *known* lodes excluded from their jurisdiction? Is it because in those cases, they created the grant by patent and were bound to create and define it in accordance with the provisions of the statute, and *not enlarge* it by erroneously adjudicating as to the existence or non-existence of a *known* lode excluded from their jurisdiction, while in this case they *can enlarge* a grant already created and defined and of which the title had already vested by a special Act of Congress, by erroneously adjudicating as to the existence or non-existence of both known and unknown mineral lands excluded from their jurisdiction?

The Land Department can not gain jurisdiction of known or unknown mineral lands which are

excluded, by a special Act of Congress, from their jurisdiction derived from that special Act, by erroneously adjudicating, in the exercise of that adjudication, that such lands are not mineral, because they are not known to be mineral.

These principles are thoroughly established by those decisions under the placer law. It is of no importance what particular language is used in removing a thing from the jurisdiction of that department or what the thing removed is. Neither of these considerations affect, in any manner or in any degree, the legal effect of such exclusion. When it is clear—and it is clear in this case—*what* is excluded from their jurisdiction, and that *it is* so excluded, the effect of the exclusion is always the same, viz.: that the officers of that department can do absolutely nothing, in the exercise of such jurisdiction, in respect to the things so excluded.

This is why the Supreme Court held, pointedly, in the Barden case, that the *exception* of mineral lands from the grant *could not be limited by inference* from any language of the granting Act “*in the face of its declaration that all mineral lands are thereby ‘excluded from its operations’*” (Opinion, pages 313-314).

For the same reason that Court distinguished Deffebach v. Hawke, *supra*, and Davis v. Weibold, *supra*, in the Barden case, as cases in which only *known* mineral lands were excluded from the jurisdiction of the Land Department by the town-

site Act, while in the Barden case both known and *unknown* mineral lands were excluded from their jurisdiction. For the same reason the Court stated in the Barden case that “the *effect* given to the townsite patent” in *Davis v. Weibbold*, was not inconsistent with the views expressed in the Barden opinion; and in that case the Court held that the mineral claimant could defeat the town-site patent, previously issued, by proving that the land was *known* to be mineral before the town-site patent issued (323-324).

For the same reason the Court held in the Barden case that the character of the mineral lands must be determined by authority of the mineral-land laws, and not by authority of the granting Act.

For the same reason the Court held, in the Barden case, that the patents *issued* under the granting Act must state that the lands were non-mineral, or they would not comply with that Act, as the adjudication of their character must be under other laws, and such decision could not therefore be presumed from the issuance of a patent *under the granting Act*, which furnished no authority for adjudication of the character of mineral lands.

And for the same reason in the Barden case, the railroad company argued: that the Secretary of the Interior had no power under the granting Act to adjudicate the character of mineral lands, and that, therefore, the patent which was due,

under the granting Act, to be issued before the land was known to be mineral, should include lands which were admitted to be mineral and were admitted not to have been known to be mineral at the time an absolute right to the patent provided for accrued.

And for the same reason, the Court replied to this argument by pointing out that the granting Act "*excludes mineral lands*" in the direction for such patent to issue", because it provides for patents "as aforesaid", "confirming" the right and title granted, and for patents "conveying" the sections "as aforesaid"; and it is *aforesaid, in the Act*, that "mineral lands" are *excepted* from the grant and that "all mineral lands" are *excluded in praesenti* from the *operations* of that Act. And for this reason the Court had already held that such *exception* could not be limited by inference *in the face* of such *exclusion*. And, for this reason the Court held that, while the granting Act furnished no authority to adjudicate the character of mineral lands, yet, *under the law* the duty of determining the character of mineral lands *under the legislation of Congress*, reposes in the officers of the Land Department. And the Court cited and quoted from cases arising under the mineral-land laws to show that the character of mineral lands included within the odd sections can be fully determined by exploration, under those laws, and their character finally adjudicated thereunder.

And for all of these reasons the Court held in the Barden case that if the patent issues before opportunity is afforded for such exploration, determination and adjudication, the patent must contain notice that no mineral lands passed thereby.

Now, that same Court says that, all these reasons, which it then saw in the granting Act, and deliberately wrote into its opinion, which has warranted the insertion of the mineral exception and exclusion clause in these patents, are no longer found in that Act, and therefore these railroad companies have acquired title to a billion dollars worth of public mineral lands contrary to the express will of Congress declared in the very Act by authority of which that title is alleged to have been acquired. Who has changed that Act of Congress?

If lands of a designated character are expressly excluded from the *jurisdiction* of the Land Department by the Act of Congress under which a patent issues, such patent should always contain notice that no lands of that character are conveyed by the patent even though they are included in the descriptive part thereof, because the patent *can not* convey them. Such notice does not restrict the title. It is restricted by the Act of Congress, which is a law, and can not be altered or changed by executive officers or Courts.

IV.

THE PATENT IMPORTS ABSOLUTE VERITY OF THE ACT ISSUING IT, AND CONSTITUTES CONCLUSIVE PROOF THAT NO MINERAL LANDS, KNOWN OR UNKNOWN, HAVE BEEN GRANTED OR CONVEYED BY IT TO THE GRANTEE NAMED THEREIN. THEREFORE, APPELLANTS ARE NOT ATTACKING THE PATENT, BUT ARE INSISTING UPON ITS TRUTHFULNESS AND VALIDITY, AND ARE IN PRIVITY WITH THE GOVERNMENT BY VIRTUE OF THEIR LOCATIONS.

"As seen by the terms of the third section of the Act, the grant is one *in praesenti*; that is, it purports to pass a present title to the land designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. * * *

"This is the construction given to similar grants by this Court, where the question has often been considered; indeed, it is so well settled as to be no longer open to discussion."

St. Paul & Pacific Railroad v. Northern Pacific Railroad, 139 U. S. 1, 5, citing Schulenberg v. Harriman, 21 Wall. 44, 60; Leavenworth, Lawrence, etc., Railroad Company v. United States, 92 U. S. 733; Missouri, Kansas, etc., Railroad Company v. Kansas Pacific Railroad Company, 97 U. S. 491; Railroad Company v. Baldwin, 103 U. S. 426.

To the same effect, and also that the function of the patent is to provide evidence for record

that the road has been constructed in compliance with the provisions of the Act and accepted, and that the lands described in the patent are the lands coterminous with the road constructed and to which the title created by the statute attached, with the exceptions specified in the statute, see also Deseret Salt Co. v. Tarpey, *supra*, 247, and cases there cited; and to the point that the exception and exclusion of mineral lands is a condition and restriction of that title, itself, see *Barden v. Northern Pacific*, *supra*, 315-316, and the same case to the point that the mineral-land exception and exclusion clause may be inserted in the patent because all mineral lands are excluded from the jurisdiction of the Land Department derived from the granting Act (page 331).

It is admitted by the appellees and held by the Court that the Land Department has no power to disregard the provisions of the Act of Congress, and to enlarge a grant made thereby, so that it will include mineral lands which were excepted from it. Especially is this true when the granting Act, itself, removed from their jurisdiction all mineral lands in a proceedings had wholly under that Act.

The mineral-land exception and exclusion clause in the patent is, therefore, only notice for record that the grant includes no mineral lands, known or unknown, and that, therefore, none are conveyed

by the patent. This being true, it must be conceded that the lands were mineral lands "belonging to the United States" at the time of the location of them as alleged and admitted in this case. As the patent could have no effect whatever, and does not purport to have any effect on the Government's title, it is difficult to perceive why the fact that it issued before the mineral locations were made, could have any effect on the validity of those locations. Nor, is it apparent how appellants are *attacking the patent*, when they are not contradicting a single sentence contained in it, but are insisting that it is in all respects valid, and that it is a truthful record of the act of issuing it, and that that act was strictly in compliance with the requirements of the Act of Congress by authority of which it was issued.

The fact is that all during the course of this litigation, the appellees have been attacking the patent, and claiming not only that the patent is not a record of the act of issuing it, but also that the department determined and adjudicated that all the lands described in the patent were non-mineral, while the patent bears unmistakable evidence on its face that no such determination or adjudication was made, and the statute forbids such adjudication in the proceedings wherein the patent issued, by excluding all mineral lands from the jurisdiction of the Land Department under that Act.

V.

THE OPINION OF THE SUPREME COURT, AS CONTAINED IN ITS ADVANCE SHEETS, SHOWS CONCLUSIVELY THAT THE COURT'S FAILURE CORRECTLY TO INTERPRET AND APPLY THE EXCLUSION CLAUSE WAS DUE TO INADVERTENCE.

The Court says:

"As has been seen, the exclusion was of 'all mineral lands'. It was not a mere reservation of mineral, but an exclusion of mineral lands, coupled with a provision that the company *should receive* other lands, not mineral, in lieu of them. This shows that a determination of the character of the lands, as mineral or non-mineral, was plainly contemplated. Besides, there was an *exclusion* of all sections and parts of sections 'granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of' when the line of the road should be definitely located, and this was followed by a similar provision for lieu lands. The *two exclusions* and indemnity provisions made it practically imperative that there be an authoritative identification of the lands passing under the grant and of those excluded, for otherwise great uncertainty in titles, conflicting claims, and vexatious litigation would be inevitable. Appreciative of this, Congress confided the identification of the lands, both included and excluded to the Land Department, of which the Secretary of the Interior is the supervising officer. We say their identification was confided to that department, because the granting Act expressly provided for the issue of patents 'confirming to said company the right and title to said lands', obviously meaning the lands granted but not the excluded lands, and also directed that the indemnity lands be selected 'under the direction of the Secretary of the Interior',

and because that department was already expressly charged with the administration and execution of all public land laws as to which it was not specially provided otherwise. Rev. Stat., Sees. 441, 453, 2478." (Citing Catholic Bishop of Nesqually vs. Gibbon, 158 U. S. 155, 166, 167.) (Italics mine.) (Opinion, pages 9-10.)

The statute provides that, after the road is completed in compliance with the provisions of the Act, and has been examined by the commissioners, reported as constructed in compliance with the Act, and has been accepted:

"patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road." (Italics mine.)

And that when other twenty-five mile sections should be constructed, completed, ready for operation, reported by the commissioners, and accepted:

"then patents shall be issued to said company conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid". (Italics mine.)

Now, in regard to the above quotation from the opinion of the Court: the statute does not provide "that the company *should receive* other lands" in lieu of mineral lands. It provides that they *may select* other lands in lieu of them. There was not "an exclusion of all sections and parts of sections 'granted, sold, reserved, etc.' " There were not

“*two exclusions*”. Only mineral lands were *excluded* from the *operations* of the *Act*, in addition to their *exception* from the *grant*; while lands “granted, sold, reserved, etc.”, were only *excepted* from the *grant*, and were not *excluded* from the *operations* of the *Act*. And the two provisions for lieu selections are not similar. The statute provides that, in lieu of lands “granted, sold, reserved, etc.,” “other lands *shall be selected*”; while it provides that, in lieu of “all mineral lands”, other lands “*may be selected*” subject to certain limitations.

As has already been stated, in quoting the fourth section of the *Act* the Court left out the word “as” in the next to the last line (opinion page 8) and in connection with it on page 10 of the opinion omitted from its quotation from the statute the phrase “as aforesaid” which was descriptive of the patent to be issued, and required it to conform to the granting provisions of the *Act*. Then by leaving out the word “as”, as above stated, the Court makes the statute say that the patents shall be issued “conveying the additional *sections* of land *aforesaid*”, while the statute provides that patents shall be issued “conveying the additional sections of land, *as aforesaid*”. By these means the Court construes the granting *Act* to provide that the patent shall *confirm* an absolute title to all lands described in it. But such construction is positively prohibited by the express terms of the *Act*, itself, not only for the reasons above stated and by the holding of that

Court in the Barden case that mineral lands are excluded in these directions for the patent to issue, but also for another reason. In the first provision for the patent to issue, the statute states that the patent shall "*confirm* the right and title" granted by the Act, and in the second provision the word "conveying" is used to designate the function of the patent, because Congress intended to qualify this function of the patent by requiring its conveyance to conform to the granting provisions of the third section of the Act. This is done by addition of the phrase "as aforesaid" to qualify the participle "conveying" instead of using the word "confirming", which, if qualified by the phrase "as aforesaid", would refer back to the other provision for the issuance of patent, instead of to the provisions of the third section of the Act which created and defined the grant.

The Court's view is certainly a distorted view of the granting Act. Congress clearly provided that the patents should except and exclude, as does the granting Act, all mineral lands which were excluded from the operations of the Act and thereby removed from the jurisdiction of the Land Department in a proceeding had wholly thereunder. Thus, it is evident that the questions heretofore certified by the Court have not been answered according to the Act of Congress which created and defined the grant and vested the title in the grantee of all lands granted by it, but that they have been answered according to the provisions of an Act of

Congress which never existed, and which, if it did exist, would contradict the provisions of this granting Act if applied to this grant and the administration thereof.

One thing is certain, that the record of the Supreme Court in these matters, evidence by the Advanced Sheets of that Court, which are required by its rules to be printed, and are therefore a part of its records, and by its mandate are made a part of the records of this Court, is conclusive evidence that the Court inadvertently erred in answering the questions heretofore certified.

If all mineral lands, known and unknown, are not excluded from the operations of this granting Act, and thereby removed from the jurisdiction of the Land Department to include them, by inference or otherwise, within the grant, then, for reasons appearing in records and discussion of which is not permitted here, even the United States is forever barred from recovering any of the valuable petroleum lands to recover which it is now suing or intending to sue the Southern Pacific Railroad Company and its grantees.

The Supreme Court held in *Reynolds v. Iron Silver Mining Co.*, *supra*, that the exclusion of known lodes from the jurisdiction of the Land Department, under the placer law, was intended to prevent people from defrauding the Government in securing known lodes at two dollars and fifty cents (\$2.50) per acre, while the Government price

was five dollars (\$5.00) per acre, and also to prevent one person from acquiring an undue portion of mineral deposits. The same ruling is found in Iron Silver Mining Co. v. Mike Sarr, *supra*, and this is given as a reason for enforcing that exclusion rigidly. If this granting Act is enforced according to its terms and import, it will render fraudulent acquisition of title to mineral lands by the grantee absolutely impossible, and an attempt so to acquire them extremely unprofitable. Yet the records of the Federal Courts of this State reveal that this grantee is pleading the statutes of limitations to charges by the United States that it has fraudulently obtained title under this very statute to mineral lands, within this State, of the value of a billion dollars. This Court is now under mandate of the Supreme Court to enter a judgment which will confirm that fraudulent alleged title, absolutely, by a ruling that those mineral lands are included within the operations of the granting Act, which expressly declares that they are all excluded from its operations. If this Court certifies to the Supreme Court the question prayed in this petition to be certified, it will be relieved of the necessity of entering such judgment, for it is the law of the Constitution, which is the law of the people, that only Congress can change an Act of Congress.

Respectfully submitted,
D. J. HINKLEY,
Solicitor for Petitioners.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE D. ROBERTS et al.,

Appellants,

vs.

THE SOUTHERN PACIFIC COMPANY, A Corporation,
and THE KERN TRADING AND OIL
COMPANY, A Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States Circuit Court for the
Southern District of California, Northern Division.

FILED
DEC 26 1911

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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GUY V. SHOUP, Esq., Flood Building, San Francisco, California.

D. V. COWDEN, Esq., Flood Building, San Francisco, California.

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

IN EQUITY—No. 177.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation), THE KERN TRADING AND OIL COMPANY (a Corporation) et al.,

Defendants.

Citation.

United States of America,—ss.

To the Southern Pacific Company, a Corporation,
and the Kern Trading and Oil Company, a Cor-
poration, Greeting:

You are hereby cited and admonished to be and ap-
pear at a United States Circuit Court of Appeals for
the Ninth Circuit, to be held at the City of San Fran-
cisco, in the State of California, on the 14th day of
October, 1911, pursuant to an order allowing an ap-
peal entered in the Clerk's office of the Circuit Court
of the United States of America for the Ninth Judi-
cial Circuit, in and for the Southern District of Cali-
fornia, Northern Division, from a final decree signed,
filed and entered in that certain cause, being in
equity numbered 177 in the Circuit Court of the
United States of America, for the Southern District
of California, Northern Division, wherein George D.
Roberts et al. are complainants and appellants and
you are defendants and appellees, to show cause, if
any there be, why the decree rendered against said
appellants in the said order allowing appeal men-
tioned should not be corrected and speedy justice
should not be done in that behalf.

Witness the Honorable WILLIAM W. MOR-
ROW, United States Circuit Judge for the Ninth
Judicial Circuit, this 15th day of September, 1911,
and of the Independence of the United States the one
hundred and thirty-six.

WM. W. MORROW,
Circuit Judge.

Service of the within Citation and receipt of copy thereof, admitted this 15th day of September, 1911.

WM. SINGER, Jr.,

D. V. COWDEN and

GUY V. SHOUP,

Solicitors for Defendants, the Southern Pacific Company, and The Kern Trading and Oil Company.

[Endorsed]: No. 177—In Equity. In the Circuit Court of the United States of America in and for the Southern District of California, Northern Division, Ninth Circuit. George D. Roberts et al., Complainants, vs. Southern Pacific Company, a Corporation, et al., Defendants. Citation. Filed Sep. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

[Subpoena Ad Respondendum.]

TO THE UNITED STATES MARSHAL FOR
THE NORTHERN DISTRICT OF CALI-
FORNIA.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California, Northern Division.*

IN EQUITY.

The President of the United States of America,
Greeting: To The Southern Pacific Company, a
Corporation, The Southern Pacific Railroad
Company of California, a Corporation, and the
Southern Pacific Railroad Company of Arizona,
a Corporation, and the Southern Pacific Rail-

road Company of New Mexico, a Corporation, Consolidated, D. O. Mills, and Homer S. King, as Trustees, The Central Trust Company of New York, State of New York, a Corporation, The Equitable Trust Company of New York, State of New York, a Corporation, The Kern Trading and Oil Company, a Corporation, Julius Kruttschnitt, J. H. Wallace, J. L. Willcutt, W. A. Worthington, E. E. Calvin, Edwin T. Dumble, George L. King, C. H. Redington, W. R. Scott, J. E. Foulds, J. A. Jones, William F. Herrin, I. W. Hellman, James Wilson, F. K. Ainsworth, William Hood, A. K. Van Deventer, Joseph Hellen and William Mahl.

YOU ARE HEREBY COMMANDED, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Fresno on the 6th day of December, A. D. 1909, to answer a [2*] a Bill of Complaint as amended exhibited against you in said court by George D. Roberts, Z. L. Phelps, James Maynard, Jr., A. M. Anderson, T. S. Minot, Newton A. Johnson, David Ewing, D. M. Speed, W. M. Johnson, S. J. Gallagher, O. D. Loftus, W. W. Ayers, H. E. Ayers, Charles James, Chalk Roberts, Robert Rendall, Henry C. Kerr, George Eagle, J. L. D. Walp, James Ward, T. J. Turner, M. J. Corey, P. W. Cypher, G. W. Warner, Claud Barnes, W. H. Fraser, David Ishlman, Ash Service, Frank Prevost, Samuel Marshback, H. R. Crozier, J. M. Robertson, P. C. Taylor, Henry Greenleaf, J. W. Swartzlander, Henry Barada, E. N. Ayers, R. M. Cook, I. W. Alex-

ander, John W. Burdette, Walter Bacon and E. M. Scott, who are citizens of the State of California, and Fred E. Windsor, who is a citizen of the State of Pennsylvania, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

WITNESS, The Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 22d day of October, in the year of our Lord one thousand nine hundred and nine, and of our Independence the one hundred and thirty-fourth.

[Seal]

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
SUPREME COURT U. S.

YOU ARE HEREBY REQUIRED, to enter your appearance in the above suit, on or before the first Monday of December next, at the Clerk's Office of said Court pursuant to said Bill as amended; otherwise the said Bill as amended will be taken *pro confesso*.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

Clerk's Office: Los Angeles, California. [3]

Marshal's Return on Service of Writ.

Northern District of California.

I hereby certify and return that I served the an-

nexed Subpoena ad Respondendum on the therein named Southern Pacific Company, a corporation, the defendant herein named, by handing to and leaving with F. H. Reed, who is the person designated by the defendant under the statutes of the State of California, as the person upon whom all legal process shall be served in matters affecting the Southern Pacific Company, a corporation, in the State of California, a true and correct copy, personally at San Francisco, California, in the State and Northern District of California, in said District, on the 26th day of October, 1909.

Dated at San Francisco, California, this 26th day of October, 1909.

T. C. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,

Office Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena Ad Respondendum on the therein named The Kern Trading and Oil Company, a corporation, by handing to and leaving a true and correct copy thereof with C. H. Paddington, Secretary of the Kern Trading and Oil Company, a corporation, personally, at San Francisco, Cal., in said District, on the 26th day of October, A. D. 1909.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,

Office Deputy. [4]

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena Ad Respondendum on the therein named The Southern Pacific Railroad Company of California, a corporation, by handing to and leaving a true and correct copy thereof with George L. King, Secretary of the Southern Pacific Railroad Company of California, a corporation, personally, at San Francisco, California, in said District, on the 26th day of October, A. D. 1909.

C. T. ELLIOTT,
U. S. Marshal.
By M. J. Fitzgerald,
Office Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena Ad Respondendum on the therein named Homer S. King, as trustee, by handing to and leaving a true and correct copy thereof with Homer S. King, as trustee, personally, at San Francisco, Cal., in said District, on the second day of November, A. D. 1909.

C. T. ELLIOTT,
U. S. Marshal.
By M. J. Fitzgerald,
Office Deputy.

[Endorsed]: Original. Marshal's Docket No. 5302. No. 177. U. S. Circuit Court, Ninth Circuit. Southern District of California, Northern Division. In Equity. George D. Roberts et al., Complainants, vs. The Southern Pacific Company, a Corporation, et al., Defendants. Subpoena. Filed Nov. 23, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [5]

[Amended and Supplemental Bill.]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

BILL IN EQUITY—No. 177.

GEORGE D. ROBERTS, Z. L. PHELPS, JAMES MAYNARD, Jr., A. M. ANDERSON, T. S. MINOT, NEWTON A. JOHNSON, DAVID EWING, W. HERBERT GATES, W. M. JOHNSON, S. J. GALLAGHER, O. D. LOFTUS, THOMAS BARRETT, Sr., H. E. AYERS, JAMES P. SWEENEY, CHALK ROBERTS, ROBERT RENDALL, MILO L. ROWELL, H. T. FAUST, JAMES WARD, J. L. D. WALP, FRED E. WINDSOR, M. J. COREY, J. W. WARNER, CLAUD BARNES, W. H. FRASER, ASH SERVICE, SAMUEL MARSHBACK, W. W. WICKLINE, J. M. ROBERTSON, P. C. TAYLOR, HENRY GREENLEAF, R. M. COOK, I. W. ALEXANDER, J. W. SWARTZLANDER,

HENRY BARADA and C. M. SCOTT, a Voluntary Unincorporated Association,

Complainants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation), (THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, and THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation, and THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated), and HOMER S. KING, as Trustee, THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE KERN TRADING AND OIL COMPANY (a Corporation), JULIUS KRUTTSCHNITT, J. H. WALLACE, J. L. WILLCUTT, W. A. WORTHINGTON, E. E. CALVIN, EDWARD T. DUMBLE, GEORGE L. KING, C. H. REDINGTON, W. R. SCOTT, J. E. FOULDS, J. A. JONES, WILLIAM F. HERRIN, I. W. HELLMAN, JAMES WILSON, E. K. AINSWORTH, WILLIAM HOOD, A. K. VAN DEVENTER, JOSEPH HELLEN, and WILLIAM MAHL,

Defendants.

Affecting Southern Pacific Railroad Company's
Land Grant of July 27th, 1866, and June 28th,
1870. [6]

To the Judges of the Circuit Court of the United States of America, in and for the Southern District of California, Northern Division, Ninth Circuit, in Chancery Sitting:

George D. Roberts, of Coalinga, California, and a citizen of the State of California, and Z. L. Phelps, of Coalinga, California, and a citizen of the State of California, and James Maynard, Jr., of San Francisco, California, and a citizen of the State of California, and A. M. Anderson, of Coalinga, California, and a citizen of the State of California, and T. S. Minot, of San Francisco, California, and a citizen of the State of California, and Newton A. Johnson, of Coalinga, California, and a citizen of the State of California, and David Ewing, of Fresno, California, and a citizen of the State of California, and W. Herbert Gates, of Coalinga, California, and a citizen of the State of California, and W. M. Johnson, of Coalinga, California, and a citizen of the State of California, and S. J. Gallagher, of Coalinga, California, and a citizen of the State of California, and O. D. Loftus, of Coalinga, California, and a citizen of the State of California, and Thomas Barrett, Sr., of San Luis Obispo, California, and a citizen of the State of California, and H. E. Ayers, of Grangeville, California, and a citizen of the State of California, and James P. Sweeney, of San Francisco, California, and a citizen of the State of California, and Chalk Roberts, of Los Angeles, California, and a citizen of the State of

California, and Robert Rendall, of Los Angeles, California, and a citizen of the State of California, and Milo L. Rowell, of Fresno, California, and a citizen of the State of California, and H. T. Faust, of Los Angeles, California, and a citizen of the State of California, and James Ward, of Coalinga, California, and a citizen of the State of California, and J. L. D. Walp, of Coalinga, California, and a citizen of the State of California, and Fred E. Windsor, of Warren, Pennsylvania, and a citizen of the State of Pennsylvania, [7] and M. J. Corey, of Coalinga, California, and a citizen of the State of California, and J. W. Warner, of Coalinga, California, and a citizen of the State of California, and Claud Barnes, of Coalinga, California, and a citizen of the State of California, and W. H. Fraser, of Oilfields, California, and a citizen of the State of California, and Ash Service, of Coalinga, California, and a citizen of the State of California, and Samuel Marshback, of San Francisco, California, and a citizen of the State of California, W. W. Wickline, of Coalinga, California, and a citizen of the State of California, J. M. Robertson, of Coalinga, California, and a citizen of the State of California, P. C. Taylor, of Fresno, California, and a citizen of the State of California, Henry Greenleaf, of Coalinga, California, and a citizen of the State of California, and R. M. Cook, of Coalinga, California, and a citizen of the State of California, and I. W. Alexander, of Coalinga, California, and a citizen of the State of California, and J. W. Swartzlander, of Coalinga, California, and a citizen of the State of California, and Henry Barada, of Coalinga,

California, and a citizen of the State of California, and E. M. Scott, of Coalinga, California, and a citizen of the State of California, a voluntary unincorporated association, bring this their first amended bill in the nature of a supplemental bill by leave of Court first had and obtained against:

The Southern Pacific Company, a corporation of Kentucky, and a citizen of the State of Kentucky,

The Southern Pacific Railroad Company, a corporation of California, and a citizen of the State of California, and

The Southern Pacific Railroad Company, a corporation of Arizona, and a citizen of the Territory of Arizona, and

The Southern Pacific Railroad Company, a corporation of the Territory of New Mexico Consolidated. [8]

Homer S. King, of San Francisco, California, and a citizen of the State of California, and

The Central Trust Company of New York City, New York, and a citizen of the State of New York, and,

The Equitable Trust Company of New York City, New York, and a citizen of the State of New York, and,

The Kern Trading and Oil Company of San Francisco, California, and a citizen and denizen of the State of California,

And thereupon your orators complain and say unto your Honors:

I.

That the defendant, the Southern Pacific Com-

pany, is a *quasi* public corporation, duly organized and existing under and by virtue of the laws of the State of Kentucky, with its head office and principal place of business at 120 Broadway, New York City, State of New York.

That the Southern Pacific Railroad Company, of California is a *quasi* public corporation, and was duly organized and now exists under and by virtue of the laws of the State of California for the purpose of constructing, operating, and maintaining a certain standard gauge steam railroad within the State of California between certain points within the borders of the said State, and it has its head office and principal place of business in the Flood Building, in the City and County of San Francisco, State of California.

That the Southern Pacific Railroad Company, of Arizona, is a *quasi* public corporation, duly organized and existing under and by virtue of the laws of Arizona, and was consolidated with the defendant, the Southern Pacific Railroad Company of California on or about the 10th day of March, 1902, together with the Southern Pacific Railroad of New Mexico. [9]

That the Southern Pacific Railroad Company of New Mexico is a *quasi* public corporation, duly organized, and existing under and by virtue of the laws of New Mexico, and was consolidated with the defendant, the Southern Pacific Railroad Company, of California, on or about the 10th day of March, 1902, together with the Southern Pacific Railroad Company of Arizona as aforesaid.

That said three consolidated corporations are

wholly owned, dominated, and absolutely controlled by defendant, the Southern Pacific Company, of Kentucky, for that, and this, that said defendant, the Southern Pacific Company of Kentucky, is a "holding" corporation, and owns all of the capital stock of each of said defendants, to wit: The Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of New Mexico, and the Southern Pacific Railroad Company of Arizona. And your orators are informed and believe has or claims to have some interest by lease or otherwise in all the lands affected by this suit.

That D. O. Mills has died since the commencement of this suit, and prior to filing this supplemental bill, and defendant, Homer S. King, is now sole trustee, in and under a certain Trust Deed, made and executed by defendant, the Southern Pacific Railroad Company of California, on the 1st day of April, 1875, purporting to secure the payment of \$46,000,000 in bonds, to be issued by the said Southern Pacific Railroad Company of California and claimed by defendants, the Southern Pacific Railroad Company of California, and Homer S. King, to be a lien upon a certain grant of land made by the United States of America to defendant, the Southern Pacific Railroad Company on the 27th day of July, 1877, as is more particularly hereinafter set forth and stated, including the lands involved in this suit.

That defendant the Central Trust Company of New York, State of New York, a private corporation, is sole trustee in and [10] under a certain deed of trust made and executed by the defendant, the South-

ern Pacific Railroad Company of California, on the 15th day of September, 1894, purporting to secure the payment of \$58,000,000 in bonds issued and to be issued by the said Southern Pacific Railroad Company, defendant herein, also in a certain supplemental Trust Deed, between the same parties, limiting said issue of bonds to \$30,000,000, and claimed by defendants, the Southern Pacific Railroad Company of California, and the Central Trust Company of New York, to be a lien upon a certain grant of lands, made by the United States of America to defendant, the Southern Pacific Railroad Company on the 27th day of July, 1866, as is more particularly hereinafter set forth and stated, including the lands involved in this suit.

That defendant, the Equitable Trust Company of New York, a private corporation, is sole trustee in and under a certain deed of trust, made and executed by the defendant, the Southern Pacific Railroad Company of California on the 3d day of January, 1905, purporting to secure the payment of \$88,502,000 in refunding bonds issued and to be issued by the said Southern Pacific Railroad Company defendant herein, and claimed by defendants the Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company of Arizona, and the Southern Pacific Railroad Company of New Mexico, and defendant, the Equitable Trust Company of New York, to be a lien upon *lien upon* the entire assets, properties, franchises and a certain grant of lands made by the United States of America to defendant, The Southern Pacific Railroad Company, on the 27th

day of July, 1866, and is more particularly herein-after set forth and stated, including the lands involved in this suit, and that for and on account of this Trust Deed, your orators say unto your Honors the defendants, The Southern Pacific Railroad Company of Arizona, and the Southern Pacific Railroad Company of New Mexico are mentioned herein as defendants coupled to and consolidated with defendant, The Southern Pacific Railroad Company of California as above stated. [11]

That the defendant, The Kern Trading and Oil Company is a private corporation, organized, and existing under and by virtue of the laws of the State of California, with its head office and principal place of business, in the offices of defendant, The Southern Pacific Railroad Company, consolidated as aforesaid, in the Flood Building, in the City and County of San Francisco, State of California.

That your orators are informed and believe, and therefore say and show unto your Honors that Edwin T. Dumble, George L. King, C. H. Redington, J. E. Foul, W. A. Worthington, and W. R. Scott, are officers and directors of the defendant, The Kern Trading and Oil Company, and that Julius Kruttschnitt, J. A. Jones, William F. Herrin, I. W. Hellman, Homer S. King, James K. Wilson, J. L. Willcutt, F. K. Ainsworth, E. E. Calvin, William Hood, A. K. Van Deventer, C. H. Redington, Joseph Hellen and William Mahl are officers and directors of defendants, The Southern Pacific Railroad Company of California, consolidated as aforesaid.

II.

Your orators further say and show unto your

Honors that there was heretofore passed by the Congress of the United States of America, and duly approved by the President of the United States of America, on the 27th day of July, 1866, a certain Act, granting certain lands to the defendant, The Southern Pacific Railroad Company of California, a corporation, subject however to certain mineral reservations, exceptions, exclusions, restrictions and limitations, in said Act contained, and that said Act, granting said lands as aforesaid, thereupon became, and now is, a public law, and that a construction, and an interpretation of sections three, and eighteen of said Acts of Congress is sought in this suit, coupled to all acts and joint resolutions amendatory thereof and supplemental thereto, and all acts of the Department [12] of the Interior of the United States of America, herein-after set forth and also the patent, hereinafter set forth, made, executed, and delivered by the United States of America to defendant, The Southern Pacific Railroad Company of California, on the 10th day of July, 1894, covering and embracing all lands involved in this suit.

And your orators further say, and show unto your Honors, that section three of said Act of July 27th, 1866, is in words and figures as follows, to wit:

“Section 3, AND BE IT FURTHER ENACTED, that there be and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said Railroad and Telegraphic line to the Pacific Coast, and to secure the safe and speedy transportation of mails, troops, and munitions of war, and

public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, whenever, on the lines thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said railroad is designated by a plat thereof, filed in the office of the Commissioners of the General Land Office; and whenever, prior to said time, any of said sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said Company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not [13] more than ten miles beyond the limits of the said alternate sections, and not including the reserved numbers: Provided further, that the Railroad Company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company' or may consolidate, confederate, and associate with said Company upon the terms named in the first and seventeenth sections of said Act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this Act, in lieu thereof a like quantity of unoccupied and unap-

propriated agricultural lands in odd numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And Provided further, that the word ‘mineral’ when it occurs in this Act, shall not be held to include iron and coal:

“And provided further, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific Railroad.

“And your orators further say that Section eighteen of said Act is in words and figures as follows, to wit:

“Section 18. And be it further enacted that the Southern Pacific Railroad, a Company incorporated under the laws of the State of California, is hereby authorized to connect with said Atlantic and Pacific Railroad, formed under this Act, at such points, near the boundary line of the State of California, as they shall deem most suitable for the railroad lines to San Francisco, and shall have uniform gauge and rate of freight and fare with said road; and in consideration thereof to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for”: [14]

That thereafter and by virtue of a joint resolution of Congress approved June 28th, 1870, certain mandatory conditions were imposed and prescribed,

by and under which, said Railroad and Telegraph line should be constructed, and under and by what terms and conditions patents should be issued by the Secretary of the Interior, to defendant, The Southern Pacific Railroad Company of California, for said granted lands, and said joint resolution was and is in words and figures as follows, to wit:

“BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED: That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said Company in the Department of Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the Company to the Secretary of the Interior, he shall direct an examination of each such section by Commissioners to be appointed by the President, as provided in the Act, making a grant of said Company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the Commissioners to the Secretary of the Interior that such section of said railroad and telegraphic line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said Company for the sections of land coterminous to each constructed Section reported on as aforesaid, to the extent and amount granted to said Company

by the said Act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said Act.

“Approved June 28th, 1870.” [15]

II $\frac{1}{2}$.

Your orators further aver and show unto your Honors that said defendants, The Southern Pacific Railroad Company of California, preparatory to, and for the purpose of, and with the intent to obtain a patent to the lands involved in this suit, and other lands, did, on or about the 9th day of May 1892, make the following appointment and certificate, pursuant to, and under and by virtue of the Acts of Congress of July 27th, 1866, July 25th, 1868, and Joint Resolution of June 28th, 1870, which said appointment and certificate was, and is, in words and figures, as follows, to wit:

“Office of the Southern Pacific Railroad Company,
San Francisco, California.

“I, Joseph L. Willcutt, Secretary of the Southern Pacific Railroad Company, do hereby certify that Jerome Madden was appointed Land Agent of the Southern Pacific Railroad Company by the Board of Directors of said Company, at a meeting held on the (10th) tenth day of May A. D. 1875, and that since that time he has been continuously, and now is, the Land Agent of the Southern Pacific Railroad Company.

“IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Corporate Seal of the South-

ern Pacific Railroad Company on the 9th day of May A. D. 1892.

[Seal] "JOSEPH L. WILLCUTT."

That thereafter, and pursuant to said Acts of Congress and in accordance therewith, and with actual knowledge, absolute acceptance thereof, complete acquiescence therein, and in due recognition of the same, said Jerome Madden did, for and on behalf of defendant, The Southern Pacific Railroad Company, make, [16] under and pursuant to the rules and regulations prescribed by the Commissioner of the General Land Office of the United States of America, and he did file a certain list of Selections of lands known, and designated herein and therein as list No. 24 of lands claimed by the Southern Pacific Railroad Company under said grant, which said list of selections include all the lands involved in this suit, and that said selections did, and does bear the following heading, statement, or claim, concerning and referring to said lands, and is duly signed by said Jerome Madden, on behalf of said defendant, and is in words and figures as follows, to wit:

"LIST OF LANDS

in the

VISLAIA LAND DISTRICT, CALIFORNIA,

Selected by the

SOUTHERN PACIFIC RAILROAD COMPANY
OF CALIFORNIA.

"The undersigned, the duly authorized Land Agent of the Southern Pacific Railroad Company, of California, and under and by virtue of the Act of

Congress, approved July 27th, 1866, entitled, ‘An Act granting lands to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast,’ and the further Act, approved July 25th, 1868, entitled ‘An Act to extend the time for the construction of the Southern Pacific Railroad in the State of California,’ and the Joint Resolutions of Congress June 28th, 1870, ‘Concerning the Southern Pacific Railroad of California,’ and under and in pursuance of the rules and regulations prescribed by the Commissioners of the General Land Office, hereby makes and files the following list of Selections of public lands claimed by the said Company as inuring to it, and to which it is entitled under and by virtue of the grants and provisions of the [17] said Acts of Congress, and the location of the line of route of the Railroad and Telegraph of said Company; being in part for ninth (9th) and seventeenth (17th) sections, (forty 559/1000 miles) of the same, commencing at a point in NE. ¼, Sec. 2, T. 19 S., R. 20 E., M. D. B. & M. and ending at Alcalde which said sections of road and *telegraphic* have been duly accepted by the President of the United States of America, as provided in the aforesaid Acts and Joint Resolutions of Congress, the Selection being particularly described as follows: * * *

“JEROME MADDEN,

“Land Agent of the Southern Pacific Railroad Company.”

That your orators have not inserted said list in detail in this bill of complaint, at any time, for the

reason that it would unnecessarily encumber the record, and subserve no pertinent purposes, and therefore is wholly omitted, but the lands immediately affected by this suit are hereinafter fully described and designated as being, and they are a part of the lands included in said List of Selections. That thereafter pursuant to said intent to obtain a patent to the lands involved in this suit, and to carry it out, and consummate the same, defendant, the Southern Pacific Railroad Company, did cause to be made by its duly authorized agent, and he did make the following false, and fraudulent affidavit, on its behalf, concerning the physical, and mineral characters of the lands involved in this suit, and did file the same in the Department of the Interior of the United States of America, and said false affidavit was and is in words and figures as follows, to wit:

“STATE OF CALIFORNIA,
City and County of San Francisco.

“I, Jerome Madden, being duly sworn, depose and say: [18] that I am the Land Agent of the Southern Pacific Railroad Company, that the foregoing list of lands which I hereby Select is a correct list of a portion of the public lands claimed by the said Southern Pacific Rairoad Company as inuring to it, to aid in the construction of the Railroad of said Company from a point in NE. $\frac{1}{4}$, Sec. 2, T. 19 S., R. 20 E., M. D. B. & M. 2 Alcalde for which a grant of lands was made by the Acts of Congress approved July 27th, 1866, July 25th, 1868, and June 28th, 1870, as aforesiad, that the said lands are vacant, unappropriated, and *are interdicted* mineral nor reserved

lands and are of the character contemplated by the grant, being within the limits of Twenty (20) miles on each side of the line route for a continuous distance of forty 559/1000 (40 559/100) miles, being for the ninth (9th) and seventeenth (17th) sections of said road starting from a point in NE. 1/4, Sec. 2, T. 19 S., R. 20 E., M. D. B. & M., and ending at a point in NE. 1/4, Sec. 23, T. 21 S., R. 14 E., M. D. B. & M.

“JEROME MADDEN. [Seal]

“Sworn to and subscribed before me this Ninth (9th) day of May, 1892. Witness my hand and Notarial seal.

[Seal].

“E. B. KYON,

Notary Public in and for the City and County of San Francisco, in the State of California.”

That thereafter and on or about May 14th, 1892, pursuant to said intent to obtain a patent to the lands involved in this suit and in furtherance thereof, defendant, the Southern Pacific Railroad Company, did by its duly authorized agents and representatives, cause the following certificate to be made by the duly appointed officers of the United States Land Office at Visalia, [19] California and which said certificate was and is in figures and words as follows, to wit:

“United States Land Office.

“Visalia, Cal., May 14th, 1892.

“We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Southern Pacific Railroad Company, by Acts of Congress, approved July 27th, 1866, July 25th, 1868, and June 28th, 1870, above mentioned and selected by Jerome Madden, the duly authorized

agent; and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of Twenty (20) miles on each side, and that the same are not or is any part thereof, returned and denominated as mineral land or lands, not claimed as swamp lands; nor is there any homestead, pre-emption, State or other valid claim to any portion of said lands on file or record in this office.

"We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the Act of Congress, approved July 1st, 1864, and contemplated by the circular of instructions dated January 24th, 1867, addressed by the Commissioner of the General Land Office of Registers and Receivers of the United States Land Offices, and that the said Company have paid to the undersigned, the Receiver, the full sum of Forty-two hundred and fifty-eight (\$4,258.00) Dollars in full payment and discharge of said fees.

"M. J. WRIGHT, Register.

"R. L. FREEMAN, Receiver.

"That thereafter, and on or about May 16th, 1894, The [20] Department of the Interior of the United States of America took action on the foregoing *ex parte* statements, affidavits, and certificates, and a new list of said lands was made by said Department of the Interior, which said list was, and is known and designated in said Department as 'LIST

NUMBER 19 SOUTHERN PACIFIC RAILROAD LANDS, MAINE LINE, GRANTED LIMITS, LOS ANGELES, INDEPENDENCE, SAN FRANCISCO AND VISALIA DISTRICTS, CALIFORNIA.' And that said list is a duplicate of list numbered 34, filed by defendant, The Southern Pacific Railroad Company, and hereinbefore referred to in this bill of complaint, and said list so prepared and numbered 19, bears and contains the following findings of facts, to wit:

“ ‘Department of the Interior
“ ‘General Land Office.,

“ ‘May 16th, 1894.

“ ‘Whereas, by the Act of Congress approved July 27th, 1866, and Joint Resolution of June 23, 1870, to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast, and to secure to the Government the use of the same for Postal, Military and other purposes; authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a Railroad and Telegraph line, under certain conditions and stipulations expressed in said Act, from the city of San Francisco, to a point of connection with the Atlantic and Pacific Railroad, near the boundary line of said State, and provision is made for granting to the said Company every alternate section of public land designated by odd numbers to the amount of twenty alternate sections per mile on each side of said Railroad, on the line thereof, and within the limits of twenty miles on each side of

said road [21] not sold, reserved, or otherwise disposed of by the United States and to which pre-emption of homestead claim may not have attached at the time the line of said road is definitely fixed.

“ ‘*And, whereas*, official statements from the Secretary of the Interior, have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the said Act of July 27, 1866, have reported to him, that the line of said Railroad and Telegraph, from San Jose to Tres Pinos, and from Alcalde to Majare, together comprising two hundred and fifty-two miles, and four hundred and seventy-nine thousandths of a mile, has been constructed and equipped in the manner prescribed by said Act of July 27, 1866, and accepted by the President,—

“ ‘*And Whereas*, the following tracts have been duly listed under the Act aforesaid, by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of sections, approved by the local officers and on file in this office,—

“ ‘*And whereas*, the said tracts of land lie coterminous to the constructed line of said road and are particularly described as follows, to wit: * * *’”

That your orators again omit any detailed list of said lands, for the reasons hereinbefore set forth and stated, and submit to your Honors that it would be unnecessary to insert such list and that such matters would be impertinent.

Your orators further show and aver, that thereafter for the purpose of carrying said land to patent,

and on or before the 16th day of May, 1894, the following certificates were made by the General Land Office of the United States of America, through its examiners and approved by its chief of Division in the following words and figures, to wit: [22]

“General Land Office.

“Railroad Division, May 16th, 1894.

“We hereby certify that the foregoing list has been carefully examined in connection with the records and plats of this office and the tracts therein described are found to be vacant and unappropriated and within the primary limits of the grant of July 27, 1866, to the Southern Pacific Railroad Company (Main Line), and subject to approval and patent to said railroad Company under said Act.

“M. V. HARVEY,

“M. NIVEN,

“Examiners.

“Approved.

“Chief of Division.”

“General Land Office.

“Mineral Division, June 23, 1894.

“This certifies that the tracts described in the foregoing Clear List No. 19 have been examined in connection with the records of this office and *are not* to be in conflict with mining claims and were not returned as mineral by the United States Surveyor General. There are no mining claims of record for lands in the townships containing selections or within

six miles of such selections.

“GEO. F. POLLOCK,

“C. A. HOLLINGSWORTH,

“Examiners.

“Approved:

“J. WRIGHT,

“Chief of Division.”

“General Land Office,

“Division of Swamp Lands,

“Washington, D. C., June 23, 1894.

“This certifies that the foregoing list No. 19, Southern Pacific Railroad, aggregating 440,900.85 acres, has been [23] carefully examined in connection with the swamp land records of this office, and that the same has been found free from conflict.

“C. T. PIERCE, Examiner.

“Approved:

“EDMOND MALLET,

“Chief of Division.”

Your orators further aver and show unto your Honors that, based upon and acting upon the foregoing *ex parte* statements, false affidavits, certificates and said findings of fact and relying upon the same, the following final order of decree, was made and entered in the Department of the Interior of the United States of America, by its duly authorized officials, to wit: The Commissioner of the General Land Office and the Secretary of the Interior, and said order, decree or judgment was and is in words and figures as follows, to wit:

“Now, therefore, as it has been found on a careful examination of the foregoing list in connection with

the authenticated map on file in the *Central Land Office*, of the Survey of the *Southern Pacific Railroad route*, that the lands fall within the twenty mile lateral limits of said route, and that the said lands so far as the records of the *Central Land Office* show are free from conflict, it is hereby recommended that the tracts described covering four hundred and forty thousand — hundred acres and twenty-five hundredths of an acre be approved and carried into patent as the lands falling within the grant by the Act aforesaid to the *Southern Pacific Railroad Company of California*, excluding, however, from the approval and from the transfer in the patent that may issue, '*All Mineral Lands*,' should any such be found in the tracts aforesaid, but this exclusion according to the terms of the statute 'shall not be construed to include iron and coal.'

“G. W. LAMOREUX,
“Commissioner. [24]

“To the Honorable, Secretary of the Interior.

“Department of the Interior,
“Washington, D. C.”

“June 27, 1894.” .

“Approved: Covering four hundred and forty thousand, nine hundred acres and eighty-five hundredths of an acre.”

“HOKE SMITH,
“Secretary.”

Your orators further say and show unto your Honors that the oath or affidavit made by Jerome Madden, for and on behalf of defendant, the Southern Pacific Railroad Company, on the 9th day of

May, 1892, concerning the mineral character of the lands involved in this suit, and stating that they were "Not interdicted mineral nor reserved lands," and that they were of "the character contemplated by the grant" is wholly, absolutely, and unqualifiedly false, fraudulent and untrue and was untrue at the time it was made by the said Jerome Madden, and he well knew it to be fraudulent, and untrue, and well knew that the lands involved in this suit were interdicted mineral lands, and that they were reserved by Congress of the United States and dedicated to the special purposes, to wit, to the public for mining purposes.

That the defendant, the Southern Pacific Railroad Company did, by said false and fraudulent affidavit deceive and impose upon and mislead the Department of the Interior in the premises, and the Department of the Interior did act upon said false affidavit, and said defendant, the Southern Pacific Railroad Company did fraudulently cause the lands involved in this suit to be listed along with other lands as nonmineral in character, and did fraudulently and deceitfully cause patent to be issued therefor [25] to defendant, Southern Pacific Railroad Company, but your orators insist and submit, that the Commissioner of the General Land Office and the Secretary of the Interior, did, by their final decree, save and preserve all mineral lands contained therein, and the equitable rights of your orators therein, and that defendant, the Southern Pacific Railroad Company, only hold the naked legal title thereto under said patent, which obstacle, patent, or

fraudulent claim of title your orators ask to have removed, restricted or controlled as is more particularly hereinafter set forth and stated.

III.

Your orators further say and show unto your Honors that the patent to the lands involved in this suit, which are embraced within the limits of said Land Grant aforesaid, follows said decree, Joint Resolution and Act of July 27, 1866, and the pertinent and essential part thereof is in words and figures as follows, to wit:

“TO ALL TO WHOM THESE PRESENTS
SHALL COME GREETING:

“WHEREAS, by the Act of Congress approved July 27, 1866, and the Joint Resolutions of June 28, 1870, ‘to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast,’ and to secure to the Government the use of the same for Postal, Military and other purposes, authority is given to the Southern Pacific Railroad Company of California, a Corporation existing under the laws of the State to construct a Railroad and Telegraph line, under certain conditions and stipulations expressed in said Act, from the City of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said State, and provision is made for granting, to the said Company every alternate section or public land designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad, on the line thereof, [26] and within the limits of twenty

miles on each side of the said road ‘not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption, or homestead claim may have not attached at the time the line of the said road is definitely fixed.’

“*And Whereas*, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the said Act of July 27th, 1866, have reported to him that the line of the said railroad and telegraph from San Jose to Tres Pinos and from Alcalde to Majave, together comprising two hundred and fifty-two and four hundred and twenty-nine thousandths of a mile has been constructed and fully completed and equipped in the manner prescribed by said Act of July 27th, 1866, and accepted by the President.

“*And Whereas*, the following tracts have been duly listed under the Act aforesaid by the duly authorized land agent of the Southern Pacific Railroad Company, as shown by his original list or selections approved by the local officers and on file in this office.

“*And Whereas*, the said tract of land lies co-terminous to the constructed line of the said road are particularly described as follows, to wit: South of the base line and east of Mount Diable Meridian, State of California.

“All of sections 5, 7, 11, 17, 19, 29, 31.

“Township 20, Range 15.

“All of sections 15, 25.

“Township 23, Range 17.

“All of section 31.

“Township 23, Range 18.

“Township 21, Range 15.

“All of section 5 and

“All of section 7 (with other lands contained in
[27] said patent not affected by this suit).

“The said tracts described in the foregoing make the aggregate area of 440,900.85 acrea.”

“NOW KNOW YE, That the United States of America in consideration of the premises and pursuant to the Acts of Congress, have given and granted by these presents to give and to grant unto the Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing.

“Yet excluding and excepting ‘All Mineral Lands,’ should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute, and shall not be construed to include ‘Coal and iron lands.’

“To have and to hold the same with the appurtenances unto the said Southern Pacific Railroad Company, and to its successors and assigns forever:

“In testimony whereof, I, Grover Cleveland, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

“Given unto my hand at the City of Washington, this tenth day of July, in the year of our Lord, one thousand eight hundred and ninety-four, and in the Independence of the United States, the one hundred and nineteenth.

“By the President, GROVER CLEVELAND,
“H. M. KEAN, Secretary.”

IV.

Your orators further say and show unto your Honors that defendant, the Southern Pacific Railroad Company, did, by virtue of its aforesaid acts, set forth in paragraph 11½ of this bill, assent to all the terms and conditions of said Act [28] of Congress, approved July 27th, 1866, and Joint Resolutions of June 28th, 1870, and did wholly submit to the terms and conditions of said Act, and did agree that said Southern Pacific Railroad and its assigns, its successors, and all persons in privity with it, would recognize, respect, abide by, be bound by, be absolutely held by the reservations, exceptions and exclusion of all mineral lands contained in said grant, *should any such be found*, according to the tenor, conditions, restrictions, terms and limitations, and reservations thereof, and *contain* in said grant and said Joint Resolution, and that said defendant, the Southern Pacific Railroad Company of California, did thereupon, and then and there recognizing said Acts of Congress, apply to the Secretary of the Interior of the United States of America for a certain patent, which is hereinbefore set forth, and which said patent covers and embraces all lands involved in this suit, and that said application, so made, was based upon said Act of Congress and Joint Resolution and the whole thereof; and the order or decree of the Department of the Interior, and that pursuant to said application and under said order or decree, said patent was issued to defendant, the Southern Pacific Railroad Company of California, on the 10th day of July, 1894, and said defendant

received, and accepted said patent, and the whole thereof, in all its parts, from the United States of America, and the United States of America have never directly or indirectly, by itself, or others, waived or repudiated the same, nor any of the terms, exceptions, reservations, or exclusions therein contained, and said patent so received and accepted by said defendant contained, and does contain the following clinging, continuing, exclusion and nonde-feasible reservation, exception, and restriction, based upon said Act of Congress, and said Joint Resolution of June 30th, 1870, and the final decree of the Department [29] of the Interior, and said reserva-tion was, and is in words as follows, to wit: "YET EXCLUDING AND EXCEPTING ALL MIN-ERAL LANDS SHOULD ANY SUCH BE FOUND IN THE TRACTS AFORESAID, BUT THIS EXCLUSION AND EXCEPTION AC-CORDING TO THE TERMS OF THE STAT-UATE, SHALL NOT BE CONSTRUED TO INCLUDE COAL AND IRON LANDS." And your orators further say and show unto your Honors, do hereby insist and submit, that the defendant, the Southern Pacific Railroad Company of California, and all persons in privity with it, and each and all defendants herein, are bound by the aforesaid acts of defendant, the Southern Pacific Railroad Company, and are estopped in equity and good conscience to claim any interest, estate or title, of any nature whatsoever, in or to any of said lands involved in this suit, by virtue of said acts herein-before or hereinafter set forth and stated.

And your orators further insist and submit, in anticipation, that, for and on account of the facts hereinbefore set forth, and all matters and things, in this bill stated, and the exclusion, exception, and reservation, in said patent, and decree of the Commissioners of the General Land Office, and the approval thereof by the Secretary of the Interior of the United States of America, based upon said Act of Congress, and joint Resolution to each of which your orators beg leave again directly and specifically refer, the statutes of limitations do not run against your orators, and that it would be inequitable, unconsciousable and unjust to apply the statute of limitations, or the analagous doctrine of laches to said continuing, nondefeasible reservation, exception and exclusion, in said grant, Joint Resolution, order or decree of the Commissioner and patent contained, against the well defined legal and equitable rights and interest of your orators in the mineral lands involved in this suit, and duly claimed by your orators under the mining laws of the United [30] States of America. And your orators further say and show unto your Honors, that for your Honors to allow the statute of limitations or the analagous doctrine of laches to prevail against your orators in this suit, and against the clinging and continuing exclusion, exception and reservation, in said grant, Joint Resolution, order or decree, and patent contained, would be equivalent and tantamount to the arbitrary nullification of said continuing and nondefeasible reservation, exclusion and exception, the decree of the Secretary of the Interior, and absolute defeat of the

express will and intent of Congress, resulting in creating a vicious monopoly in and under the domination and control of the defendant, the Southern Pacific Railroad Company of Kentucky, contrary to law, equity, and good conscience and, public policy, and against the vital interests of your orators and all citizens of the State of California and the United States of America.

VI.

And your orators further say and show unto your Honors, that the said Act of Congress granting said lands to defendant, The Southern Pacific Railroad Company of California, and all Acts and Joint Resolutions supplementary thereto, or amendatory thereof, and the Acts of the Department of the Interior of the United States of America, in issuing said patent to the lands involved in this suit, and the recording of said patent, were and are public acts, and should be taken as, and termed public acts in all courts and places whatsoever, as by said acts, intended, and which your orators beg leave to refer.

VII.

Your orators further say and show unto your Honors, that defendant, Homer S. King, as trustee, of the first deed of trust, hereinbefore referred to, placed upon said granted lands, as aforesaid, by defendant, The Southern Pacific Railroad [31] Company of California, and made, executed, and delivered, by said defendant on or before the first day of April, 1875, by virtue thereof, claims to have some estate, title or interest in and to all the lands involved in this suit, adverse to your orators, but your orators

insist and submit, that on account of the matters and things in this bill stated, that each, all or any claim made by said defendant under said trust deed, or otherwise are invalid, illegal; and wholly and utterly void, and of no effect against your orators, and that said defendants have no rights, interest or estate in any part thereof; for that said deed was made and accepted with a full knowledge of said Act of Congress and Joint Resolution.

And your orators further say and show unto your Honors, that defendant, the Central Trust Company of New York, a corporation, as trustee of the second trust deed, hereinbefore referred to, and placed upon said granted lands, as aforesaid, by defendant, the Southern Pacific Railroad Company, and made, executed, and delivered, by said defendant, on or about the first day of September, 1893, by virtue thereof, *claim* to have some estate, right, title, or interest in and to all the land involved in this suit, adverse to your orators, but your orators insist and submit that on account of the matters and things in this bill stated, that each, all, or any claims made by said defendant under said trust deed, or otherwise are invalid, illegal and wholly and utterly void and of no effect, and that said defendant has no rights, interests or estate in or to any of the lands involved in this suit, as against your orators, or any part thereof; for that said deed was made and accepted with a full knowledge of said Act of Congress and Joint Resolution.

And your orators further say and show unto your Honors, that defendant, the Equitable Trust Com-

pany of New York, a corporation, as trustee of the third trust deed hereinbefore referred to, as aforesaid, and placed upon said granted lands by defendant, the Southern Pacific Railroad Company, and made, executed and delivered by said defendant on or about the 3d day of January, 1905, by virtue thereof claim to have some interest, estate, right or title, in and to all the lands involved in this suit, adverse to your orators, but your orators insist and submit that on account of the matters and *th* things in this bill stated, that each, all or any claims made by said defendant under said trust deed, or otherwise are invalid, illegal and wholly void and of no effect, and that said defendant has no rights, interest or estate in or to any of the lands involved in this suit, as against your orators, or any part thereof; for that said deed was made and accepted with full knowledge of said Act of Congress and Joint Resolution.

And your orators further say and show unto your Honors, that defendant, the Kern Trading and Oil Company is a *suppositious* corporation, and exists in form only, and is composed of and officered by and absolutely dominated, owned and managed and [32] controlled by certain dummies, employees, officers, and directors of its confederate, The Southern Pacific Railroad Company, a corporation, defendant herein, and was organized with the fraudulent intent, and for the unlawful purpose of doing certain things indirectly, which defendant, its confederate, the Southern Pacific Railroad Company, a corporation, could not do directly: that is to say, to sink, develope, operate, and monopolize oil wells, and, by such

actions to monopolize and hold unto itself all mineral oil lands within the borders or outlines of its said grant, in the State of California, contrary to said Act of Congress and said Joint Resolution, and that pursuant to that fraudulent intent, and to carry out said surreptitious, and deceitful scheme, confederating together with said defendant, the Southern Pacific Railroad Company, a corporation, has, at divers times, since the incorporation of defendant, its confederate, and conduit, the Kern Trading and Oil Company, which was incorporated on or about the 21st day of May, 1903, secretly made and entered into, certain leases of certain lands, to this defendant, the Kern Trading and Oil Company, and the defendant, the Southern Pacific Railroad Company, conspiring and confederating together with the Kern Trading and Oil Company, and with defendants, Edwin T. Dumble, George L. King, J. B. Foulds, W. A. Worthington, W. R. Scott, and C. H. Redington, directors, dummies and officers of said defendant and further confederating with each other, and the defendant, the Southern Pacific Company of Kentucky, and with defendants, I. W. Hellman, H. A. Jones, William F. Herrin, Homer S. King, James K. Wilson, J. L. Willcutt, F. K. Ainsworth, E. E. Calvin, William Hood, A. K. Vandeventer, Joseph Hellman and William Hood, directors, and officers and stockholders, of defendant, the Southern Pacific Railroad Company have for the purpose of circumventing the laws, obliquely evading [33] its effects, and creating and maintaining a monopoly as aforesaid, made, executed and delivered many secret

leases from itself to itself through the medium of defendant, the Kern Trading and Oil Company, using it as a fraudulent vehicle, conduit or go-between to carry out said fraudulent conspiracy. That said leases are not recorded in any public places of the State of California, but are clandestinely held and secreted by the defendant, The Southern Pacific Railroad Company, and your orators do not know, and are unable to find out, or ascertain just what covenants and conditions said leases contain, when they were executed, or when they expire, or what lands are claimed to be affected by said fraudulent leases, so secretly and surreptitiously executed and delivered, to said suppositious corporation, defendant, the Kern Trading and Oil Company, but your orators say, based upon the foregoing facts and information and belief that defendant, the Kern Trading and Oil Company claim to have some estate, right, title or interest in and to all of the property involved and claimed in this suit by your orators by virtue of said clandestine leases, adverse to your orators, but by virtue of and on account of the matters and things in this bill stated, all claims or any claims made by said suppositious and fraudulent corporation, the Kern Trading and Oil Company, defendant, affecting any of the lands involved herein or claimed by your orators in this suit, under said fraudulent leases or otherwise are invalid, illegal and wholly void and of no effect and said defendant has neither rights, interests, or estate in or to any of the lands involved in this suit, or any part thereof as against your orators.

And your orators further say, and show unto your Honors, that all of the lands hereinafter described and claimed by your orators are vacant, unimproved, uninclosed, and wild lands, and each quarter section thereof is "proved" lands and contains [34] mineral oil and other kindred minerals in large and paying quantities, and that said lands are more valuable for mining purposes than any other.

And your orators further aver and show unto your Honors that, prior to the making of the locations hereinafter mentioned, the said locators actually discovered valuable deposits of petroleum and mineral oils, upon each and every one hundred and sixty acres of land involved in this suit and in large and paying quantities on each and every claim herein, and that said petroleum and mineral oil, did then and does now actually exist therein and is in large and paying quantities in each and every quarter section and claim. That the lands immediately adjoining, abutting and contiguous to the tracts involved in this suit, and upon all sides of each of said claims, was and is "proved" mineral and oil land, in which petroleum in large and paying quantities has been and now is found, and which contains shale, seepage of oil, and veins of sand-rock, which said veins, oil, and shale did, and now does extend upon, through, underneath and completely across each and all of the said mining claims set forth and described in this suit. That all of the claims hereinbefore described are wholly within the areas of lands previously withdrawn from any but mineral land entry by the Department of the Interior of the United States of America, and

each and all of said lands, and the surrounding lands, contiguous thereto have been, and are now classified by the United States of America through the Department of the Interior as being, and they are exclusively and notoriously mineral oil lands, and have been publicly known to be such since 1892. That on the 10th day of July, 1894, upon which date said patent was issued to, and accepted by the said defendant, the Southern Pacific Railroad Company, as aforesaid, it then and long prior thereto, well knew, and its officers well [35] knew and had actual knowledge at said time, of the existence of mineral and petroleum in paying quantities in all the lands involved in this suit, and now claimed by your orator and said defendant well knew at the time said patent was issued and accepted by it, and long prior thereto, that said lands involved in this suit and every quarter section thereof contained mineral oils, and other kindred minerals, and that said lands were and now are more valuable for mining purposes, and the mineral oils therein, than for agricultural purposes, or for any other purposes.

Your orators further insist and submit, that defendant, the Southern Pacific Railroad Company does refuse to permit any of the lands involved in this suit to be exploited, developed, or improved in any way, manner, *shap* or form, and the Southern Pacific Company of Kentucky, is conspiring, and confederating with the Southern Pacific Railroad Company of California and the Kern Trading and Oil Company and all of their officers, directors, agents, representatives, and other defendants herein,

to withhold said lands from exploitation, and development against the well-defined common rights of your orators and the citizens of the United States of America to locate and develop said lands, under said exclusion, exception and reservation, in said Acts of Congress, and patent contained, and the mining laws of the United States of America, and your orators further insist and submit that neither the defendant, the Southern Pacific Company, the Southern Pacific Railroad Company, nor the Kern Trading and Oil Company, nor their associates, confederates, directors, agents, representatives, officers, co-conspirators, or *other* others connected with them, have any right or authority to withhold said lands from development and exploitation by your orators, or to retard the progress and growth of the community wherein said lands are situated. [36]

VIII.

And your orators further show unto your Honors, that your orators, and certain grantors herein named did in Fresno and Kings County, State of California, on the 19th day of June, 1909, and at divers other times, as is more particularly herein set forth and stated, duly take possession of, and did duly locate, and duly claim, under the mining laws of the United States of America, in good faith, the following described placer mining claims within the limits of said grant which said claims were located as follows, and said notices of locations were, and are, together with the endorsements therein, in words and figures as follows, to wit:

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the under-

signed have this day located and claimed, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Northwest Corner of Section 5, Township 21 South, Range 15 East, M. D. B. & M. and running South 40 chains, thence East 40 chains; thence North 40 chains; thence West 40 chains to point of beginning, this being the Northwest quarter of Section 5, Township 21, South, Range 15, East M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum, and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the New View Mining Claim. It is situated in Fresno County, State of California. Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

T. S. MINOT.

Z. L. PHELPS.

JAMES MAYNARD, Jr. [37]

A. M. ANDERSON.

GEORGE D. ROBERTS.

NEWTON A. JOHNSON.

DAVE EWING.

D. M. SPEED.

S. J. GALLAGHER,

Witness to posting.

[Endorsed]: Filed for Record at the Request of D. S. Ewing, June the 21st, 1909, at 17 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining

Claim, pg. 80, Fresno County Records. R. N. Barstow, County Recorder.
8960.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows. Commencing at the Southeast Corner of Section 7, Township 21 South, Range 15 East, M. D. B. & M., and running North 40 chains, thence West 40 chains, thence South 40 chains, thence East 40 chains to point of beginning, this being the Southeast quarter of Section 7, Township 21, South, Range 15, East M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Zeb Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this 21st day of June, 1909.

R. M. COOK.

Z. L. PHELPS.

T. S. MINOT.

NEWTON A. JOHNSON.

I. W. ALEXANDER.

GUY H. SALISBURY. [38]

JAS. MAYNARD, Jr.

D. M. SPEED.

R. M. COOK,

Witness to posting.

[Endorsed]: Filed for record at the request of Everts & Ewing, June 21, A. D. 1909, at 6 min. past 11 o'clock A. M.; and recorded in volume 15 of Mining Claims, pg. 108, Fresno County Records. R. M. Barstow, County Recorder. By W. H. Bates, Deputy Recorder.

8995.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day —— and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows: Commencing at the Northeast Corner of Section 11, Township 20, South, Range 15, East, M. D. B. & M., and running South 40 chains, thence West 40 chains, thence North 40 chains, thence East 40 chains, to the point of beginning, this being the Northeast quarter of Section 11, Township 20 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Eleven Mining Claim. Is situate in Fresno County, State of California, Located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

T. J. TURNER.

E. M. SCOTT.

D. M. SPEED.

M. E. COOK.

M. J. COREY.

P. W. CYPHER.

GEO. W. WARNER. [39]

CLAUD BARNES.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing June the 21st, A. D. 1909, at 25 min. past 8 o'clock A. M. and recorded in Vol. 15, of Mining Claims, pg. 81, Fresno County Records. R. N. Barstow, County Recorder.

8968.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Northwest Corner of Section 31, Township 20 South, Range 15, East, M. D. B. & M., and running South 40 chains, thence East 40 chains, thence North 40 chains, thence West 40 chains, to point of beginning, this being the Northwest quarter of section 31, Township 20 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acrea or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the James Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on

the ground, this 19th day of June, 1909.

CHARLES JAMES.

CHALK ROBERTS.

ROBERT RENDALL.

HENRY C. KERR.

GEO. EAGLE.

JAMES WARD.

A. M. ANDERSON.

J. L. D. WALP. [40]

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Filed for record at the request of D. S. Ewing June 21st, A. D. 1909, at 3 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 65, Fresno County Records. R. N. Barstow, County Recorder.

8946.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Northwest Corner of Section 29, Township 20, South, Range 15 East, M. D. B. & M., and running East 40 chains, thence South 40 chains, thence West 40 chains, thence North 40 chains to a point of beginning, this being the Northwest quarter of Section 29, Township 20 South, Range 15 East, M. D. B. & M. and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Swartzlander Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this 19th day of June, 1909.

J. W. SWARTZLANDER
N. M. SALISBURY.
HENRY BARADA.
S. J. GALLAGHER.
E. N. AYERS.
GEORGE D. ROBERTS.
O. D. LOFTUS.
W. W. AYERS.

Witness:

W. M. JOHNSON. [41]

[Endorsed]: Filed for record at the request of D. S. Ewing June 21st, A. D. 1909, at 5 min. past 8 o'clock A. M., and recorded in Vol. 15, of Mining Claims, pg. 63, Fresno County Records. R. N. Barstow, County Recorder.

8948

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the Southeast Corner of Section 29, Township 20 South, Range 15 East M. D. B. & M., and running North 40 chains, thence West 40 chains, thence South 40 chains, thence East 40

chains to a point of beginning this being the South-east quarter of Section 29, Township 20 South, Range 15 east M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and Mining purposes and uses.

This claim shall be known as the Marshback Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

SAM MARSHBACK,

W. H. CROSIOR.

J. H. ROBERTSON.

P. C. TAYLOR.

HARRY GREENLEAF.

DAVE EWING.

A. M. ANDERSON.

WM. M. JONSON.

Witness:

W. M. JOHNSON.

[Endorsed]: Filed for record at the request of D. S. Ewing [42] June 21st, 1909, at 4 min. past 8 o'clock, A. M., and recorded in Vol. 15 of Mining Claims, pg. 64, Fresno County Records. R. N. Barstow, County Recorder.

8947.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim under the Mining Laws of the United States the following Placer Claim, bounded and described as follows:

Commencing at the quarter corner, west line of Section 21, Township, 20 South, Range 15 East M. D. B. & M., and running 20 chains, South; thence East 80 chains; thence North 20 chains; thence West 80 chains to point of beginning; this being the North half of section 31, Township 20, South, Range 15 East M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Tommy Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this 19th day of June, 1909.

T. J. TURNER.

E. M. SCOTT.

M. E. COOK.

M. J. COREY.

P. W. CYPHER.

GEO. W. WARNER.

CLAUD BARNES.

W. H. FRASER.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 1 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 67, Fresno County Records. R. N. Barstow, County Recorder.

8944. [43]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the under-

signed have this day located and claim under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Southeast Corner of Section 11, Township 20 South, Range 15 East M. D. B. & M., and running North 40 chains, thence West 40 chains, thence South 40 chains, thence East 40 chains, to point of beginning, this being the Southwest quarter of Section 11, Township 20 South, Range 15, East, M. D. B. & M. and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This Claim shall be known as the Fraser Clan Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

W. H. FRASER,
DAVE ISHLMAN,
ASH SERVICE,
FRANK PROVOST,
SAM MARSHBACK,
H. R. CORZIER,
J. H. ROBERTSON,
P. C. TAYLOR,

Locators.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 24 min. past

8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 73, Fresno County Records. R. N. Barstow, County Recorder.

8967. [44]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the Northwest Corner of Section 11, Township 20 South, Range 15 East, M. D. B. & M., and running South 40 chains, thence North 40 chains, thence West 40 chains, to point of beginning, this being the Northwest quarter of Section 11, Township 20, South, Range 15, East, M. D. B. & M. and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Greenleaf Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

HARRY GREENLEAF,
DAVE EWING,
N. M. SALISBURY,
J. W. SWARTZLANDER,
HENRY BARADA,
E. N. AYERS,

W. M. JOHNSON,
GEORGE D. ROBERTS,
Locators.

Witness to posting,
S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 23 min. past 8 o'clock A. M., and recorded in Vol. 15, pg. 90, Fresno County Records. R. N. Barstow, County Recorder.
8966. [45]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the Southwest Corner of Section 5, Township 20 South, Range 15 East, M. D. B. & M., and running North 40 chains, thence East 40 chains, thence South 40 chains, thence West 40 chains to point of beginning this being the Southwest Quarter of Section 5, Township 20, South, Range 15, East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This Claim shall be known as the Southern Five Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

CHARLES JAMES.
CHALK ROBERTS.

ROBERT RENDALL.
HENRY C. KERR.
GEORGE EAGLE.
JAMES WARD.
A. M. ANDERSON.
J. L. D. WALP.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 18 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 82, Fresno County Records. R. N. Barstow, County Recorder.

8961. [46]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the Northeast Corner of Section 5, Township 20 South, Range 15 East, M. D. B. & M., and running South 40 chains, thence West 40 chains, thence North 40 chains, thence East 40 chains to point of beginning this being the Northeast quarter of Section 5, Township 20 South, Range 15, East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This Claim shall be known as the Five Oil Mining

Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

J. M. ROBERTSON,
P. C. TAYLOR,
H. R. CROZIER,
JAMES WARD,
T. J. TURNER,
E. M. SCOTT,
M. J. COREY,
P. W. CYPHER,

Locators.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 21 min. past 8 o'clock A. M., and recorded in Volume 114 of Mining Claims, pg. 392, Fresno County Records. R. N. Barstow, County Recorder.

8964. [47]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the Southeast Corner of Section 5, Township 20 South, Range 15 East, M. D. B. & M., and running North 20 chains, thence West 40 chains, thence South 40 chains, thence East 40 chains to point of beginning, this being the Southeast quarter of Section 5, Township 20 South, Range 15, East,

M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances, contained therein, also water for domestic and mining purposes and uses.

This Claim shall be known as the George W. Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

GEORGE W. WARNER.

CLAUD BARNES.

D. M. SPEED.

DAVE ISHLMAN.

J. W. SWARTZLANDER.

HENRY BARADA.

E. N. AYRES.

N. M. SALISBURY.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, 1909, A. D., at 20 min. past 8 o'clock A. M., and recorded in Vol. 14 of Mining Claims, pg. 403, Fresno County Records. R. N. Barstow, County Recorder.

8963. [48]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN THAT the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the Southwest Corner of Section 29, Township 20 South, Range 15, East, M.

D. B. & M., and running North 40 chains, thence East 40 chains, thence South 40 chains, thence West 40 chains to a point of beginning, this being the Southwest quarter of Section 29, Township 20 South, Range 15, East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Bacon Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

JNO. W. BOURDETTE,
WALTER BACON,
H. E. AYERS,
E. N. AYERS,
CHALK ROBERTS,
ROBERT RENDALL,
HENRY C. KERR,
J. L. D. WALP,

Locators.

Witness: W. M. JOHNSON.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 6 min. past 8 o'clock A. M., and Recorded in Vol. 15 of the Mining Claims, pg. 74, Fresno County Records. R. N. Barstow, County Recorder.

8949. [49]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this *this* day located and claim, under

the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the Northeast Corner of Section 31, Township 20 South, Range 15, East, M. D. B. & M., and running West 40 chains, thence South 40 chains, thence East 40 chains, thence North 40 chains to the point of beginning, this being the Northeast quarter of section 31, Township 20, South, Range 15, East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and Mining purposes and uses.

This claim shall be known as the Johnson Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

WM. JOHNSON.

S. J. GALLAGHER.

GEORGE D. ROBERTS.

O. D. LOFTUS.

W. W. AYERS.

JOHN W. BOURDETTE.

WALTER BACON.

H. E. AYERS.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 2 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 66, Fresno County Records. R. N. Bar-

stow, County Recorder.

8945. [50]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the Southwest Corner of Section 5, Township 21 South, Range 15 East, M. D. B. & M., and running North 40 chains, thence 40 chains, East, thence South 40 chains, thence West 40 chains to point of beginning, this being the Southwest quarter of Section 5, Township 21 South Range 15, East, M. D. B. & M., containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the New West Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this 19th day of June, 1909.

WALTER BACON,

H. E. AYERS.

ROBERT RENDALL.

HENRY C. KERR.

Z. L. PHELPS.

T. S. MINOT.

N. M. SALISBURY.

J. L. D. WALP.

S. J. GALLAGHER,

Witness to posting.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, 1909, at 16 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 72, Fresno County Records. R. N. Barstow, County Recorder.

8959. [51]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the Northwest Corner of Section 5, Township 20 South, Range 15, East, M. D. B. & M., and running South 40 chains, thence East 40 chains, thence North 40 chains, thence West 40 chains to point of beginning, this being the boundary of the Northwest quarter of Section 5, Township 20, South, Range 15, East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Big Five Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

W. M. JOHNSON,
S. J. GALLAGHER,
GEORGE D. ROBERTS,
O. D. LOFTUS,
W. W. AYERS,

JNO. W. BOURDETTE,
WALTER BACON,
H. E. AYERS,

Locators.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing June 21st, A. D. 1909, at 19 min. past 8 o'clock A. M., and recorded in Vol. 14, pg. 381, Fresno County Records. R. N. Barstow, County Recorder.

8962. [52]

NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Ground, viz.:

Commencing at the Southwest Corner of Section 17, Township 20 South, Range 15, East, M. D. B. & M., thence North 40 chains, thence at right angles East 40 chains, thence at right angles South 40 chains, thence at right angles, West 40 chains, to place of beginning and containing according to U. S. Surveyor, 160 acres.

The above claim is located by the undersigned locators as an association of eight persons and containing eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and kindred minerals and all minerals found therein or thereon, and water for domestic

mining and other purposes, and a copy of this notice was duly posted on said claim on the 19th day of June, 1909. And said claim is being the Southwest quarter, situate in the Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Eagle Oil Placer Mining Claim. Located 19th day of June, 1909.

GEORGE EAGLE.

JAMES WARD.

J. L. D. WALP.

E. M. SCOTT.

E. N. AYERS.

A. M. JOHNSON.

T. J. TURNER.

M. E. COOKE.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant's Mining District, County. Dated 190..... recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 11 min. past 8 o'clock A. M., Vol. 14 of Mining Claims, at page 379 et seq., Fresno County Records. R. N. Barstow, Recorder.

8954. [53]

NOTICE OF LOCATION PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned, Citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Mining ground, viz.: Commencing at the Southeast Corner of Section 19, Township

20 South, Range 15 East, M. D. B. & M., thence North 40 chains, thence at right angles West 40 chains, *thence at right angles West 40 chains*, thence at right angles South 40 chains, thence at right angles East 40 chains to the place of beginning, and containing according to U. S. Survey 160 acres.

The above claim is located by the undersigned locators as an association of eight persons, and contains eight Placer Claims, said claim is located for the purpose of *holding* and developing all Petroleum, Asphaltum, and all kindred minerals and all minerals found therein or thereon, and water for domestic, mining and other purposes, and the copy of this notice was duly posted on said claim, on the 19th day of June, 1909, and said claim is—being the Southeast quarter situate in the Coalinga Mining District, County of Fresno, State of California. This Claim shall be known as the Tom Oil Placer Mining Claim.

Located 19th day of June, 1909.

T. J. TURNER.

M. E. COOK.

P. J. CYPHER.

CLAUD BARNES.

E. M. SCOTT.

M. J. COREY.

GEORGE W. WARNER.

W. H. FRASER.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location, Claimant. Recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 13 min. past 8 o'clock A. M., in Vol. 14

of Mining Claims, page 390 et seq., Fresno County Records. R. N. Barstow, Recorder.

8956. [54]

NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Mining Ground, viz.: Commencing at the Northeast Corner of Section 19, Township 20, South, Range 15 East, M. D. B. & M., thence running West 40 chains, thence at right angles South 40 chains, thence at right angles 40 chains, East; thence at right angles North 40 chains to place of beginning and containing according to U. S. Surveys 160 acres, being the Northeast quarter.

The above Claim is located by the undersigned locators as an association of eight persons and containing eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum, and all kindred minerals and all minerals found therein or thereon, and water for domestic, mining, and other purposes, and a copy of this notice was duly posted on said claim on the 19th day of June, 1909, and the said claim is situate in Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Old Oil Placer Mining Claim. Located day of June, 1909.

CHARLES JAMES.

CHALK ROBERTS.

HENRY C. KERR.

JAMES WARD.

O. D. LOFTUS.

ROBERT RENDALL.

GEO. EAGLE.

J. L. D. WALP.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant Mining District, County. Dated, 190..... Recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 14 min. past 8 o'clock A. M., in Vol. 14 of Mining Claims, page 382 et seq., Fresno County Records. R. N. Barstow, Recorder.

8957. [55]

NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Mining Ground, viz.: Commencing at the Northeast Corner of Section 17, Township 20, South, Range 15 East, M. D. B. & M., thence West 40 chains, thence at right angles South 40 chains, thence at right angles East 40 chains, thence at right angles North 40 chains to the place of beginning, containing according to U. S. Surveys, 160 acres.

The above Claim is located by the Undersigned Locators as an Association of eight persons and containing eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum,

Asphaltum, and kindred minerals, and all minerals therein and thereon, and water for domestic, mining and other purposes, and a copy of this notice was duly posted on said Claim on the 19th day of June, 1909, and said Claim is.....

Being in the Northeast quarter, situate in the Coalinga Mining District, County of Fresno, State of California.

This Claim shall be known as the Ishlman Oil Placer Mining Claim, located 19th day of June, 1909.

DAVE ISHLMAN.

FRANK PROVOST.

H. R. CROZIER.

P. C. TAYLOR.

ASH SERVICE.

SAM MARSHBACK.

J. M. ROBERTSON.

HARRY GREENLEAF.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant Mining District County. Dated, 190..... Recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 9 min. past 8 o'clock A. M., in Vol. 15 of Mining Claims, at page 75 et seq., Fresno County Records. R. N. Barstow, Recorder.

8952. [56]

NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the requirements of the Revised Statutes of the

United States, have this day located the following described Mining Ground, viz.:

Commencing at the Northeast Corner of Section 29, Township 20 South, Range 15, East, M. D. B. & M., being the Northeast quarter. Thence West 40 chains, thence at right angles South 40 chains, thence at right angles East 40 chains, thence at right angles North 40 chains, to the place of beginning and containing according to U. S. Surveys 160 acres.

The above claim is located by the undersigned Locators, as an Association of eight persons, and contains eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and kindred minerals, and all minerals found therein or thereon, and water for domestic, mining and other purposes, and a copy of this notice was posted on said claim on the 19th day of June, 1909, and said claim is situate in the Coalinga Mining District, County of Fresno, State of California.

This Claim shall be known as the Corey Oil Placer Mining Claim. Located 19th day of June, 1909.

M. J. COREY.

E. N. AYERS.

GEO. W. WARNER.

W. H. FRASER.

M. E. COOK.

P. W. CYPHER.

CLAUDE BARNES.

DAVE ISHLMAN.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location, Claimant. Mining District County. Dated, 190..... Recorded at the request D. S. Ewing. June 21st, A. D. 1909, at 7 min. past 8 o'clock A. M., in Vol. 15 of Mining Claims, pg. 84, Fresno County Records. R. N. Barstow, Recorder.

8950. [57]

NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Mining Ground, viz.: Commencing at the Northwest Corner of Section 17, Township 20 South, Range 15 East, M. D. B. & M., thence South 40 chains, thence East at right angles 40 chains, thence at right angles North 40 chains, thence at right angles West 40 chains to the place of beginning and containing, according to the U. S. Survey 160 acres, being the Northwest quarter.

The above claim is located by the undersigned Locators as an Association of eight persons, and contains eight Placer Claims, said Claim is located for the purpose of holding and developing all Petroleum, Asphaltum and kindred minerals and all minerals found therein or thereon, and water for domestic mining and other purposes, and a copy of this notice was duly posted on said claim, on the 19th day of June, 1909, and said claim is situate in the Coalinga Mining District, County of Fresno, State of California.

This Claim shall be known as the Ayers Oil Placer Mining Claim. Located 19th day of June, 1909.

W. W. AYERS.

WALTER BACON.

CHARLES JAMES.

ROBERT RENDALL.

JNO. W. BOURDETTE.

H. E. AYERS.

CHALK ROBERTS.

HARRY C. KERR.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location, Claimant. Mining District, County. Dated 190..... Recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 12 min. past 8 o'clock A. M., in Vol. 14, Mining Claim, page 402, Fresno County Records. R. N. Barstow, Recorder.

8955. [58]

NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Mining Ground, viz.:

Commencing at the Southwest Corner of Section 7, Township 20 South, Range 15 East, M. D. B. & M., being the Southwest quarter, thence North 40 chains, thence at right angles East 40 chains, thence at right angles South 40 chains, thence at right angles West 40 chains to place of beginning and containing

according to U. S. Survey 160 acres.

The above claim is located by the undersigned Locators, as an Association, of eight persons, and contains eight Placer Claims said claims is located for the purpose of holding and developing all Petroleum, Asphaltum and other kindred minerals and all minerals found therein or thereon, and water for domestic, mining and other purposes, and a copy of this notice was posted on said claim on the 19th day of June, 1909, and said claim is situate in the Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Bourdette Oil Placer Mining Claim. Located 19th day of June, 1909.

JNO. W. BOURDETTE.
WALTER BACON.
E. N. AYERS.
ASH SERVICE.
W. W. AYERS.
N. E. AYERS.
A. M. ANDERSON.
FRANT PROVOST.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant Mining District, County. Dated, 190..... Recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 8 min. past 8 o'clock A. M., in Vol. 15 of Mining Claims at [59] page 77 et seq., Fresno County Records. R. N. Barstow, Recorder.

NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States have this day located the following described Placer Mining Grounds, viz.:

Commencing at the Southeast Corner of Section 17, Township 20 South, Range 15 East, M. D. B. & M., thence North 40 chains, thence at right angles West 40 chains, thence at right angles South 40 chains, thence at right angles East 40 chains to the place of beginning and containing according to the U. S. Survey 160 acres.

The above claim is located by the undersigned Locators as an Association of eight persons, and contains eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and all kindred minerals, and all minerals found therein or thereon, and water for domestic, mining and other purposes, and a copy of this notice was duly posted on said claim, on the 19th day of June, 1909, and said claim being the Southeast quarter situate in the Coalinga Mining District, County of Fresno, State of California.

This Claim shall be known as the Ewing Oil Placer Mining Claim. Located 19th day of June, 1909.

DAVE EWING.

J. W. SWARTZLANDER.

W. M. JOHNSON.

GEO. D. ROBERTS.

N. M. SALISBURY.

HENRY BARADA.

S. J. GALLAGHER.

O. D. LOFTUS.

Witness to posting,
W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant Mining District, [60] County. Dated 190.... Recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 10 min. past 8 o'clock A. M., in Vol. 15 of Mining Claims, page 85, Fresno County Records. R. N. Barstow, Recorder.

8953.

NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the Revised Statutes of the United States, have this day located the following described Placer Mining Ground, viz.:

Commencing at the quarter section corner in the West line of Section 19, Township No. 20, South of Range 15, East, M. D. B. & M., Fresno County, California, thence South 20 chains, thence at right angles East 40 chains, thence at right angles North 40 chains, thence at right angles West 40 chains, to the place of beginning, containing 80 acres as per U. S. Survey.

The above claim is located by the undersigned Locators as an Association of eight persons, and contains eight Placer claims. Said Claim is located for the purpose of holding and developing all Petroleum, Asphaltum and all kindred minerals and other minerals found therein or thereon, and water for domes-

tie, mining and other purposes, and a copy of this notice was duly posted on said claim on the 19th day of June, 1909. Being the North half of the Southwest quarter situate in the Coalinga Mining District, County of Fresno, State of California. This claim be known as the New Oil Placer Mining Claim. Located 19th day of June, 1909.

W. M. JOHNSON.

A. M. ANDERSON.

S. J. GALLAGHER.

GEO. D. ROBERTS.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant Mining District, County. Dated, 190.

[61]

Recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 15 min. past 8 o'clock A. M., in Vol. 15 of Mining Claims at page 91 et seq., Fresno County Records. R. N. Barstow, Recorder.
8958.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the Quarter Corner in east line of Section 7, Township 21 South, Range 15, East, M. D. B. & M., and running North 20 chains, thence West 80 chains, thence South 20 chains, thence East 80 chains, to point of beginning, this being the South

half of Section 7, Township 21 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Seven Oil Mining Claim is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 21st day of June, 1909.

Z. L. PHELPS,
A. M. ANDERSON,
E. M. SCOTT,
M. J. COREY,
R. M. COOKE,
T. S. MINOT,
WALTER BACON,
W. W. AYERS,

Locators.

R. M. COOK,

Witness to posting.

[Endorsed]: Filed for Record at the request of Everts & Ewing, June 21st, A. D. 1909, at 5 min. past 8 o'clock A. M., and recorded [62] in Vol. 15, of Mining Claims, pg. 107, Fresno County Records. R. N. Barstow, County Recorder. By W. H. Bates, Deputy Recorder.

8994.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following de-

scribed Placer Claim, bounded and described as follows:

Commencing at the Southwest corner of Section 11, Township 20 South, Range 15 East, M. D. B. & M. and running North 40 chains, thence East 40 chains, thence South 40 chains, thence West 40 chains to point of beginning, this being the Southwest quarter of Section 11, Township 20 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Greater Mining Claim. Is situate in Fresno County, State of California.

Located and a copy of this notice posted on the ground this 19th day of June, 1909.

S. J. GALLAGHER,
D. M. SPEED,
O. D. LOFTUS,
W. W. AYERS,
JNO. W. BOURDETTE,
WALTER BACON,
H. E. AYERS,
CHALK ROBERTS,

Locators.

Witness to posting,

S. J. GALLAGHER. [63]

[Endorsed]: Filed for Record at the request of D. S. Ewing June 21st, A. D. 1909, at 22 min. past 8 o'clock A. M., and recorded in Vol. 14 of Mining

Claims, pg. 384, Fresno County Records. R. N. Barstow, County Recorder.

8965.

NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the Revised Statutes of the United States, have this day located the following described Placer Mining Ground, viz.:

Commencing at the Southwest corner of Section 7, Township 21, South, Range 15 East, M. D. B. & M., and running thence North 40 chains, East 40 chains, South 40 chains, thence West 40 chains to point of beginning, being Lots No. 3, No. 4, No. 5, No. 6 according to U. S. Surveys, containing 160 acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses, situate in the Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Buster Oil Placer Mining Claim, Located 21st day of June, 1909.

T. J. TURNER.

G. W. WARNER.

H. R. CROZIER.

Z. L. PHELPS.

P. W. CYPER.

W. H. FRASER.

DAVE EWING.

GEO. D. ROBERTS.

Witness to posting,

R. M. COOK.

[Endorsed]: Notice of Location. Claimant Mining District, County. Dated, 190..... Recorded at the request of Everts & Ewing, June 21st, A. D. 1909, at 7 min. past 11 o'clock A. M., in Vol. 15 of Mining Claims, at page 86, Fresno County Records. R. N. Barstow, Recorder. By W. H. Bates, Deputy Recorder.

8996 [64]

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the Southeast corner of Section 15, Township 23 South, Range 17 east, M. D. B. & M., and running North 40 chains, thence West 40 chains, thence South 40 chains, thence East 40 chains to point of beginning, this being the Southeast quarter of Section 15, Township 23 South, Range 17, East M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Dave Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

DAVE EWING,
GUY H. SALISBURY,

J. W. SWARTZLANDER,
HENRY BARADA,
E. N. AYERS,
W. M. JOHNSON,
S. J. GALLAGHER,
GEO. D. ROBERTS,

Locators.

Witness to posting,

S. J. GALLAGHER.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: [65]

Commencing at the Southeast corner of Section 25, Township 23 South, Range 17 East, M. D. B. & M., and running North 40 chains, thence West 40 chains, thence South 40 chains, thence East 40 chains to point of beginning, this being the Southeast quarter of Section 25, Township 23 South, Range 17 East, M. D. B. & M., and containing one *and* hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the M. J. C. Oil Mining Claim. Is situate in Kings County, State of California.

Located, and a copy of this notice posted on the

ground this the 19th day of June, 1909.

M. J. COREY,
P. W. CYPHER,
GEO. W. WARNER,
CLAUD BARNES,
M. H. FRASER,
DAVE ISHLMAN,
ASH SERVICE,
FRANK PREVOST,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st A. D. 1909, at 19 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 459, Kings County Records.
Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: [66]

Commencing at the Northeast corner of Section 25, Township 23 South, Range 17 East, M. D. B. & M., and running South 40 chains, thence West 40 chains, thence North 40 chains, thence East 40 chains to point of beginning this being the Northeast quarter of Section 25, Township 23 South Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic

and mining purposes and uses.

This claim shall be known as the Kerr Oil Mining Claim. Is situated in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

HENRY C. KERR,
GEORGE EAGLE,
JAMES WARD,
A. M. ANDERSON,
J. L. D. WALP,
T. J. TURNER,
E. M. SCOTT,
M. E. COOKE,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 18 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 459, Kings County Records.
Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the Southwest corner of Section 23, Township [67] 23 South, Range 17 East M. D. B. & M., and running North 40 chains, thence 40 chains, East, thence South 40 chains, thence West 40 chains to point of beginning, this being the South-

west quarter Section 23, Township 23 South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This Claim shall be known as the Loftus Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

O. D. LOFTUS,
W. W. AYERS,
JNO. W. BOURDETTE,
WALTER BACON,
H. E. AYERS,
CHARLES JAMES,
CHALK ROBERTS,
ROBERT RENDALL,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at request of A. M. Anderson, June 21st, A. D. 1909, at 17 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 458, Kings County Records. Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Northwest corner of Section 23, Township 23 South, Range 17 East, M. D. B. & M., and running South 40 [68] chains, thence East 40 chains, thence North 40 chains, thence West 40 chains to point of beginning, this being the Northwest quarter of Section 23, Township 23 South, Range 17 East M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the J. W. Oil Mining Claim. Is situate in Kings County, State of California.

Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

J. M. SWARTZLANDER,
HENRY BARADA,
E. N. AYERS,
D. M. SPEED,
W. M. JOHNSON,
S. J. GALLAGHER,
O. D. LOFTUS,
GEO. D. ROBERTS,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 16 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 458, Kings County Records.
Jas. M. Bowman, Recorded.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer claim, bounded and described as follows:

Commencing at the Northwest corner of Section 15, Township 23, South, Range 17, East, M. D. B. & M., and running South 40 chains, thence East 40 chains, thence North 40 chains, thence [69] West 40 chains to point of beginning, this being the Northwest quarter of Section 15, Township 23 South, Range 17 East M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Roberts Oil Mining Claim. Is situated in Kings County, State of California.

Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

GEORGE D. ROBERTS,
O. D. LOFTUS,
W. W. AYERS,
JNO. W. BOURDETTE,
WALTER BACON,
H. E. AYERS,
CHAS. JAMES,
CHALK ROBERTS,

Locators.

Witness to posting,
S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 12 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 456. Kings County Records. Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the Southeast corner of Section 23, Township 23, South Range 17, East M. D. B. & M., and running North 40 chains, thence West 40 chains, thence South 40 chains, thence East 40 chains to point of beginning, this being the Southeast quarter of Section 23, Township 23 South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less. [70]

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Prevost Oil Mining Claim. Is situate in Kings County, State of California.

Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

FRANK PREVOST,
SAM MARSHBACK,
H. R. CROZIER,
J. M. ROBERTSON,
P. C. TAYLOR,

HARRY GREENLEAF,

DAVE EWING,

N. M. SALISBURY,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D., 1909, at 15 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 457, Kings County Records.
Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the Southwest corner of Section 25, Township 23 South, Range 17 East, M. D. B. & M. and running North 40 chains, thence East 40 chains, thence South 40 chains, thence West 40 chains to point of beginning, this being the Southwest quarter of Section 25, Township 23 South, Range 17 East M. D. B. & M., and containing one hundred and sixty acres or less. [71]

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Barada Oil Mining Claim. Is situate in Kings County, State of California.

Located, and a copy of this notice posted on the

ground this the 19th day of June, 1909.

HENRY BARADA,
E. W. AYERS,
D. M. SPEED,
W. M. JOHNSON,
S. J. GALLAGHER,
GEORGE D. ROBERTS,
O. D. LOFTUS,
W. W. AYERS,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 21 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 460, Kings County Records.
Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Northwest corner *corner* of section 25, Township 23 South, Range 17 East, M. D. B. & M., and running South 40 chains, thence East 40 chains, thence North 40 chains, thence West 40 chains to the point of beginning, this being the Northwest quarter of Section 25, Township 23 South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred sub-

stances [72] contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Uncle Sam Oil Mining Claim. Is situate in Kings County, State of California.

Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

SAM MARSHBACK,
H. R. CROZIER,
J. H. ROBERTSON,
P. C. TAYLOR,
HARRY GREENLEAF,
DAVE EWING,
GUY SALISBURY,
J. W. SWARTZLANDER,
Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 20 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 460, Kings County Records. Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Northeast corner of Section 15, Township 23 South, Range 17 East, M. D. B. & M., and running South 40 chains, thence West 40 chains,

thence North 40 chains, thence East 40 chains to point of beginning this being the Northeast quarter of section 15, Township 23 South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. [73]

This claim shall be known as the Fifteen Oil Mining Claim. Is situate in Kings County, State of California. Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

DAVE ISHLMAN,
ASH SERVICE,
FRANK PREVOST,
SAM MARSHBACK,
H. R. CROZIER,
W. M. JOHNSON,
P. C. TAYLOR,
HARRY GREENLEAF,
Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 10 min. past 8 o'clock A. M., in Vol. 3, Misel., page 455, Kings County Records.
Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following de-

scribed Placer Claim, bounded and described as follows:

Commencing at the Northeast corner of Section 23, Township 23 South, Range 17 East, M. D. B. & M., and running South 40 chains, thence West 40 chains, thence North 40 chains, thence East 40 chains to point of beginning, this being the Northeast quarter of Section 23, Township 23, Range 17, East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. [74]

This claim shall be known as the Cooke Oil Mining Claim. Is situate in Kings County *County*, State of California.

Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

M. E. COOKE,
M. J. COREY,
P. W. CYPHER,
GEO. W. WARNER,
CLAUD BARNES,
W. H. FRASER,
DAVE ISHLMAN,
ASH SERVICE,

Locators.

Witness to posting.

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 14 min. past 8 o'clock, in Vol. 3

of Miscel. Records, page 457, Kings County Records.
Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Southeast corner of Section 31, Township 23, South, Range 18, East, M. D. B. & M., and running North 40 chains, thence West 40 chains, thence South 40 chains, thence East 40 chains, to point of beginning, this being the Southeast quarter of Section 31, Township 23 South, Range 18 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Ward Oil Mining Claim. Is situate in Kings County, State of California. [75]

Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

JAMES WARD,
A. M. ANDERSON,
J. L. D. WALP,
T. J. TURNER,
E. M. SCOTT,
M. E. COOKE,

M. J. COREY,
P. W. CYPHER,
Locators.

Witness to posting,
S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 8 min. past 8 o'clock A. M., in Vol. 3 Miscel., page 454, Kings County Records.
Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the Southwest corner of Section 31, Township 23 South, Range 18 East, M. D. B. & M., and running North 40 chains, thence East 40 chains, thence South 40 chains, thence West 40 chains to point of beginning this being the Southwest quarter of Section 31, Township 23 South, Range 18 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the J. M. R. Oil Mining Claim.

Is situate in Kings County, State of California.
Located, and a copy of this notice posted on the

ground [76] this the 19th day of June, 1909.

J. M. ROBERTSON,
P. C. TAYLOR,
HARRY GREENLEAF,
DAVE EWING,
N. W. SALISBURY,
J. W. SWARTZLANDER,
HENRY BARADA,
D. M. SPEED,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 9 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 454, Kings County Records.
Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Northwest corner of Section 31, Township 23 South, Range 18 East, M. D. B. & M., and running South 40 chains, thence East 40 chains, thence North 40 chains, thence West 40 chains to point of beginning, this being the Northwest quarter of Section 31, Township 23 South, Range 18 East M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred sub-

stances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the George W. Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909. [77]

GEO. W. WARNER.

CLAUD BARNES.

W. H. FRASER.

DAVE ISHLMAN.

ASH SERVICE.

FRANK PREVOST.

SAM MARSHBACK.

H. R. CROZIER.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 6 min. past 8 o'clock A. M., in Vol. 3 Miscel., Kings County Records. Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the Northeast corner of Section 31, Township 23, South, Range 18, East, M. D. B. & M., and running South 40 chains, thence West 40 chains, thence North 40 chains, thence East 40 chains

to point of beginning, this being the Northeast quarter of Section 31, Township 23, South, Range 18 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Thirty One Oil Mining Claim. Is situate in Kings County, State of California.

Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

JNO. W. BOURDETTE,
WALTER BACON, [78]
H. E. AYERS,
CHAS. JAMES,
CHALK ROBERTS,
ROBERT RENDALL,
HENRY C. KERR,
GEORGE EAGLE,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 7 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 453, Kings County Records. Jas. M. Bowman, Recorder.

LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the

Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the Southwest of Section 15, Township 23 South, Range 17, East, M. D. B. & M., and running North 40 chains, thence East 40 chains, thence South 40 chains, thence West 40 chains to point of beginning, this being the Northwest quarter of Section 15, Township 23, South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic purposes and uses.

This claim shall be known as the Rendall Oil Mining Claim. Is situate in Kings County, State of California.

Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

ROBERT RENDALL,
HENRY C. KERR,
GEORGE EAGLE,
JAMES WARD,
A. M. ANDERSON, [79]
J. L. D. WALP,
T. J. TURNER,
E. M. SCOTT,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 13 min. past 8 o'clock A. M., in

Vol. 3 of Miscel., page 456, Kings County Records.
Jas. M. Bowman, Recorder.

And your orators further say, that said notices of location were duly filed, in the manner prescribed by law, for record, and were duly recorded in the office of the County Recorders of Fresno and Kings Counties, State of California, at the time and on the dates in the endorsements thereon and therein respectfully set forth and stated; and that none of said locations nor the records of the same, nor any, or either of them, have ever been relinquished, waived, or cancelled, but now are, and have been, at all times in full force and effect.

VIII $\frac{1}{2}$.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration, and in good faith, Guy H. Salisbury and N. M. Salisbury, and E. M. Cooke, P. W. Cypher and Frank Prevost, the original locators of the hereinafter described Placer Mining Claims, bargained, sold, quitclaimed, transferred and conveyed to Fred E. Windsor all the rights, title, claim, interest and estate in and to said certain Placer Mining Claims set forth in this bill, known and described as follows to wit:

The Zeb Mining Oil Claim. Commencing at the southeast corner of Section 7, Township 21 south, Range 15 east, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to point of beginning, and being the southeast quarter of Section 7, Township 21 south, Range [80] 15 east, M. D. B. & M., and con-

taining one hundred and sixty acres or less, and filed for record in Vol. 15 of Mining Claims, page 108, Fresno County Records, No. 8995.

Also the Eleventh Mining Claim. Commencing at the northeast corner of Section 11, Township 20 south, Range 15 east, M. D. B. & M., and running south 40 chains, thence west 40 chains, thence north 40 chains, thence east 40 chains to the point of beginning. This being the northeast quarter of Section 11, Township 20 south, Range 15 east M. D. B. & M., and containing one hundred and sixty acres or less.

Also the Swartzlander Oil Mining Claim. Commencing at the northwest corner of Section 29, Township 20 south, Range 15 east, M. D. B. & M., and running east 40 chains, thence south 40 chains, thence west 40 chains, thence north 40 chains to the point of beginning. This being the northwest quarter of Section 29, Range 15 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Also the Tommy Oil Mining Claim, commencing at the quarter west line of Section 31, Township 20 south, Range 15 east, M. D. B. & M., and running south 20 chains, thence east 30 chains, thence north 20 chains, thence west 80 chains to point of beginning. This being the north half of the south half of Section 31, Township 20 south, Range 15 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also the Greenleaf Mining Claim. Commencing at the northwest corner of Section 11, Township 20 south, Range 15 east, M. D. B. & M., and running south 40 chains, thence east 40 chains thence north

40 chains; thence west 40 chains to the point of beginning. This being the northwest quarter of Section 11, Township 20 south, Range 15 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Also the George W. Mining Claim. Commencing at the [81] southeast corner of Section 5, Township 20 south, Range 15 east, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to point of beginning, this beinf the southeast quarter of Section 5, Township 20 south, Range 15 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Also the New West Mining Claim. Commencing at the southwest corner of section 5, Township 30 south, Range 15 east, M. D. B. & M., and running north 40 chains, thence east 40 chains, thence south 40 chains, thence west 40 chains to point of beginning, being the southwest quarter of Section 5, Township 20 south, Range 15 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Also the Eagle Oil Placer Mining Claim. Commencing at the southwest corner of Section 19, Township 20 south, Range 15 east, M. D. B. & M., thence north 40 chains, thence at right angles east 40 chains, thence at right angles south 40 chains, thence at right angles west 40 chains to place of beginning, containing one hundred and sixty acres or less.

Also the Tom Oil Placer Mining Claim. Commencing at the southeast corner, Section 19, Township 20 south, Range 15 east, M. D. B. & M., thence

north 40 chains, thence at right angles west 40 chains, thence at right angles south 40 chains, thence at right angles east 40 chains to place of beginning, containing one hundred and sixty acres.

Also the Corey Oil Placer Mining Claim. Commencing at the northeast corner of Section 29, Township 20 south, Range 15 east, M. D. B. & M., being the northeast quarter; thence west 40 chains, thence at right angles south 40 chains, thence at right angles east 40 chains, thence at right angles north 40 chains to place of beginning, containing one hundred and sixty acres. [82]

Also the Ewing Oil Placer Mining Claim. Commencing at the southeast corner of Section 17, Township 20 south, Range 15 east, M. D. B. & M., thence north 40 chains, thence at right — west 40 chains; thence at right angles south 40 chains; thence at right angles east 40 chains to place of beginning, containing one hundred and sixty acres.

Also the Dave Oil Mining Claim. Commencing at the southeast of section 15, Township 23 south, Range 17 east, M. D. B. & M., and running north 40 chains; thence west 40 chains, thence south 40 chains, thence east 40 chains, to place of beginning, being the southeast quarter of Section 15, Township 23 south, Range 15 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also the Kerr Oil Mining Claim. Commencing at the northeast corner of Section 23, Township 23 south, Range 17 east, M. D. B. & M., and running south 40 chains, thence west 40 chains, thence north 40 chains; thence east 40 chains to point of beginning,

being the northeast quarter of section 25, Township 23 south, Range 17 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Also Prevost Oil Mining Claim. Commencing at the southeast corner of section 25, Township 23 south, Range 17 east, M. D. B. & M., and running north 40 chains; thence west 40 chains, thence south 40 chains, thence east 40 chains to point of beginning, being the southeast quarter of Section 23, Township 23 south, Range 17 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also the Uncle Sam Oil Mining Claim. Commencing at the northwest corner of section 25, Township 23 south, Range 17 east, M. D. B. & M., and running south 40 chains, thence east 40 chains, thence north 40 chains, thence west 40 chains to point of beginning, being the northwest quarter of Section 25, Township 23 south, Range 17 east, M. D. B. & M., containing one hundred and sixty [83] acres or less.

Also the Cooke Oil Mining Claim. Commencing at the northeast corner of Section 23, Township 23 south, Range 17 east, M. D. B. & M., and running south 40 chains; thence west 40 chains, thence north 40 chains, thence east 40 chains to point of beginning, being the northeast quarter of Section 23, Township 23 south, Range 17 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also the Ward Oil Mining Claim. Commencing at the southeast corner of Section 31, Township 23 south, Range 13 east, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south

40 chains, thence east 40 chains to point of beginning, being the southeast quarter of Section 31, Township 23 south, Range 15 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Also the J. M. R. Oil Mining Claim. Commencing at the southwest corner of Section 31, Township 23 south, Range 18 east, M. D. B. & M., and running north 40 chains; thence east 40 chains, thence south 40 chains; thence west 40 chains to point of beginning, being the southwest quarter of Section 31, Township 23 south, Range 18 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also all the right, title, interest and estate of P. W. Cypher in and to the Five Oil Mining Claim, the Eleven Mining Claim, the Tom Oil Placer Mining Claim, the Corey Oil Placer Mining Claim, the Tommy Oil Mining Claim, the Cooke Oil Mining Claim, the M. J. C. Oil Mining Claim, the Ward Oil Mining Claim, and the Buster Oil Placer Mining Claim as is in this bill hereinbefore described.

Also all the right, title, interest and estate of Frank Prevost in and to the Bourdette Oil Placer Mining Claim, the Fraser Clan Mining Claim, the Ishlman Oil Placer Mining Claim, [84] the Fifteen Oil Mining Claim, the Prevost Oil Mining Claim, the M. J. C. Oil Mining Claim, the Geo. W. Oil Mining Claim, as is in this bill hereinbefore described.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration, and in good faith Ed. N. Ayres, John W. Bourdette, Walter Bacon, Dave

Ishlman, Chas. James, the original locators of the hereinafter described Placer Mining Claims, *bargain*, sold, quitclaimed, transferred and conveyed to James P. Sweeney, all the rights, title, claim, interest and estate in and to certain Placer Mining Claims set forth in this bill, known and described as follows to wit:

The George W. Mining Claim, Bourdette Oil Placer Mining Claim, Greenleaf Mining Claim, Eagle Oil Placer Mining Claim, Corey Oil Placer Mining Claim, Swartzlander Oil Mining Claim, Bacon Oil Mining Claim, Dave Oil Mining Claim, J. W. Oil Mining Claim, Barada Oil Mining Claim, Big Five Mining Claim, Greater Mining Claim, Ayers Oil Placer Mining Claim, Johnson Oil Mining Claim, Roberts Oil Mining Claim, Loftus Oil Mining Claim, Thirty-one Oil Mining Claim, New West Mining Claim, Seven Oil Mining Claim, Fraser Clan Mining Claim, Ishlman Oil Placer Mining Claim, Fifteen Oil Mining Claim, Cooke Oil Mining Claim, M. J. C. Oil Mining Claim, Southern Five Mining Claim, Old Oil Placer Mining Claim, James Oil Mining Claim as is in this bill hereinbefore described.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration, and in good faith W. W. Ayers, the original locator of the herein-after described Placer Mining Claims bargained, sold, quitclaimed, transferred and conveyed to Thomas Barrett, Sr., all the rights, title, claim, interest and estate in and to certain placer mining claims

set forth in this bill, known and described as follows to wit: [85]

The Big Five Mining Claim, Bourdette Placer Mining Claim, Greater Mining Claim, Ayers Placer Mining Claim, Swartzlander Mining Claim, Johnson Oil Mining Claim, Roberts Oil Mining Claim, *Roberts Oil Mining Claim*, Loftus Oil Mining Claim, Barada Oil Mining Claim, Seven Oil Mining Claim.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration, and in good faith H. R. Crozier, the original locator of the hereinafter described Placer Mining Claims, bargained, sold, quitclaimed, transferred and conveyed to W. W. Wickline, all his right, title, interest, claim and estate in and to certain Placer Mining Claims set forth in this bill, known and described as follows to wit:

The Five Oil Mining Claim, the Fraser Clan Mining Claim, Ishlman Oil Placer Mining Claim, Marshback Oil Mining Claim, Fifteen Oil Mining Claim, Prevost Oil Mining Claim, Uncle Sam Oil Mining Claim, Geo. W. Oil Mining Claim, Buster Oil Placer Mining Claim.

Your orators further state and show unto your Honors that prior to the commencement of this suit, for a valuable consideration and in good faith, George Eagle, the original locator of the hereinafter described Placer Mining Claims, bargained, sold, quitclaimed, transferred and conveyed to William M. Johnson, all the right, title, claim, interest and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

Southern Five Mining Claim, Eagle Oil Placer Mining Claim, Old Oil Placer Mining Claim, James Oil Mining Claim, Rendall Oil Mining Claim, Kerr Oil Mining Claim, Thirty-one Oil Mining Claim.

Your orators further state and show unto your Honors that prior to the commencement of this suit, for a valuable consideration and in good faith, Henry C. Kerr, the original locator of there hereinafter described Placer *Placer* Mining Claim, bargained, sole, quitclaimed, transferred and conveyed to Milo L. Rowell, all the right, title, claim, interest and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

Southern Five Mining Claim, Ayers Oil Placer Mining Claim, Old Oil Placer Mining Claim, James Oil Mining Claim, Bacon Oil Mining Claim, Kerr Oil Mining Claim, Rendall Oil Mining Claim, Thirty-one Oil Mining Claim, New West Mining Claim. [86]

Your orators further state and show unto your Honors that prior to the commencement of this suit, for a valuable consideration and in good faith, D. M. Speed, the original locator of the hereinafter described placer mining claims, bargained, sold quitclaimed, transferred and conveyed to W. Herbert Gates, all the right, title, claim, interest and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

George W. Mining Claim, Greater Mining Claim, Eleven Mining Claim, J. W. Oil Mining Claim, Barada Oil Mining Claim, J. M. R. Oil Mining Claim, New View Mining Claim, Zeb Oil Mining Claim.

Your orators further state and show unto your

Honors, that prior to the commencement of this suit, for a valuable consideration, and in good faith, T. J. Turner, the original locator of the hereinafter described placer mining claims, bargained, sold, quit-claimed, transferred and conveyed, to H. T. Faust, all the right, title, claim, interest and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

Five Oil Mining Claim, Eleven Mining Claim, *Eleven Mining Claim*, Eagle Oil Placer Mining Claim, Tom Oil Placer Mining Claim, Tommy Oil Mining Claim, Rendall Oil Mining Claim.

And your orators further say unto your Honors, that Fred E. Windsor, Thomas Barrett, Sr., James P. Sweeney, W. W. Wickline, William M. Johnson, Milo L. Rowell, W. Herbert Gates, H. T. Faust are now the true and lawful owners and holders of all the title and estate of said grantors, original locators of said premises and Placer Mines conveyed as aforesaid.

IX.

And your orators further say unto your Honors, that they are now in actual possession of said lands hereinbefore described, under the mining laws of the United States of America, and [87] your orators further insist and submit that they are entitled to the exclusive use and possession of all of said lands, to do all assessment work thereon, subject, however, to the paramount title of the United States of America therein and thereto up to and until such time as your orators can obtain a patent thereto by the removal of, or the restriction of the operation of

the patent herein set forth and assailed, and your orators further say unto your Honors, in anticipation that, for and on account of the facts hereinbefore set forth, and all matters and things in this bill stated that it would be a vain, useless act on their part to apply for a patent to the duly constituted Federal authorities for the lands involved in this suit until the patent herein is restricted or controlled by the injunction arm of this Honorable Court.

X.

Your orators show and aver, that defendant The Southern Pacific Railroad Company and its confederates, and its fraudulent conduit, the Kern Trading and Oil Company, defendant herein, threatens to and will, unless restrained and enjoined, trespass upon the lands involved in this suit, and that said defendants will interfere with the possession of said lands by your orators by force, and violence, and with hired, vicious and desperate men, will prevent your orators from performing the necessary and lawful assessment work upon said lands, or from making further and proper discoverys of minerals or oil thereon.

The defendants, the Kern Trading and Oil Company, did willfully and knowingly, through one of its duly authorized agents, and officers, maliciously publish or did cause to be maliciously published, in the "California Oil World," a newspaper of general circulation, published at Bakersfield, Kern County, California, in July 1st, 1909, issue thereof the following unlawful, wicked and vicious threat. [88]

“RAILROAD TO PROTECT LANDS.

“Will not say whether with Rigs or Guns.

“Bakersfield, June 30.—A high official of the K. T. & O., who declined to permit his name to be used, asserted emphatically to-day that the Southern Pacific would protect all the lands that it owns that have been jumped.

“‘You may be fully assured’, said he, ‘that if any overt act is undertaken by the jumpers who have filed location notices on all the land of the company from Sunset through Coalinga, we will protect our property.’

“‘How will you protect it?’ he was asked. ‘With guns or drilling rigs?’

“‘We will protect it effectively,’ was the reply.”

And your orators further show and aver, that defendant, The Kern Trading and Oil Company, is meant by the letters and sign K. T. & O. in said article, in said newspaper, and defendant, The Kern Trading and Oil Company did in fact, intend it to be understood by those who read such article, and said article was and is understood by those who read it to mean, and it did and does mean, that defendant, The Kern Trading and Oil Company and its confederate, the Southern Pacific Railroad Company, would and will use deadly weapons to drive your orators off from, and away from the lands located by your orators, and claimed in this suit, thereby preventing your orators from doing their assessment work, as by law required, and obtaining patents. And defendants the Southern Pacific Railroad Company, and its confederates, the Kern Trading and Oil Company,

have made divers and sundry other vicious and unlawful threats, to divers persons, to the effect, that they, the said defendants, would take the law in their own hands to protest their so called pretended, and usurped claims in the lands involved in this suit, by firearms, and deadly weapons, committing murder, if necessary; and your [89] orators aver, that unless restrained and enjoined by the process of your Honorable Court said acts will be committed by said defendants and the damages and injuries so threatened will be irreparable, unless it please your Honors, the premises considered to grant unto your orators an interlocutory injunction pending the determination of this suit.

XI.

Your orators further aver and show unto your Honors, that each piece, parcel or tract of land involved in this suit is over the value of \$2,000.00, exclusive of interest and costs. And your orators in consideration thereof, and forasmuch as your orators are entirely remediless in the premises according to the strict rules of the common law and can only have relief in a court of equity, where matters of this kind are properly cognizable and relievable, and to save a multiplicity of suits and actions at law, and to the end, therefore, that the said defendants may, if they can (answer under oath being specially waived), and according to the best, and utmost of their several belief, fully true, direct and perfect answers make to such of the several interrogatories hereinafter numbered and set forth as by note hereunder written they are respectfully required to an-

swer; that is to say:

1st. Has the Southern Pacific Company a lease upon the roadbed and rolling stock of the Southern Pacific Railroad Company; if so, when does it expire, and what are the terms, covenants and consitions, and does it include in any way, or effect in any way, the land grant now held by defendant the Southern Pacific Railroad Company, under the Act of Congress approved July 27, 1866, and all Acts and Joint Resolutions amendatory thereof, and supplementary thereto.

2nd. Have you, or either of you, a copy of the agreement consolidating the Southern Pacific Railroad Company of California, [90] with the Southern Pacific Railroad Company of Arizona and New Mexico?

3rd. Will you please produce it or a true copy of the original?

4th. If you will not produce it, what is there contained in said agreement that you desire to conceal?

5th. What motive have you in concealing said agreement and why do you refuse to produce it?

6th. Please give the full and true names of all the stockholders in the defendant, the Kern Trading and Oil Company and state whether or not its stock is held in escrow and by whom and whose safe it is in and why it was put there, and in whose name?

7th. Please give the present occupation of the Directors of the Kern Trading and Oil Company.

8th. How long have they, each, worked for the Southern Pacific Railroad Company?

9th. What salary do they, each, receive from the

Southern Pacific Railroad Company?

10th. What salary do they, each, receive from the Kern Trading and Oil Company, as officers, or directors of that corporation?

11th. Please state who are now the trustees of the first mortgage on the land grant of 1866 and 1870 of defendant, the Southern Pacific Railroad Company of California.

12th. Please state who are now the trustees of the second and third mortgage upon the land grant of the Southern Pacific Railroad Company of California.

13th. Please state how many leases the Southern Pacific Company has made to the Kern Trading and Oil Company.

14th. Will you please furnish a copy of said leases and place the same on file with the papers in this case? [91]

15th. If not, why?

16th. What do you wish to conceal?

17th. Why did *you record* these leases with the respective Recorders of Fresno and Kings Counties, California, in the manner provided by law in the State of California, and according to the custom of business men in all communities, and what do you wish to conceal?

18th. Where is the head office and principal place of business of defendant, the Kern Trading and Oil Company; is it in the Flood Building, San Francisco, California?

19th. Is it not a fact that the Kern Trading and Oil Company was organized for the purpose of hold-

ing and muniplulating all the mineral lands of the Southern Pacific Railroad Company of California in California?

20th. Why and for what purpose was it organized? Please state fully without evasion, reservation or equivocation or deceit.

21st. Have you any objection to giving the solicitor or counsel for complainants permission to examine the books of the Kern Trading and Oil Company?

22nd. If you have, why?

23rd. What do you wish to conceal?

24th. How much money does the Kern Trading and Oil Company turn over monthly or at any other time to defendant the Southern Pacific Railroad Company?

25th. How much semi-annually?

26th. How much annually?

27th. When does settlements take place between the Kern Trading and Oil Company, and the Southern Pacific Railroad Company?

28th. Will you furnish a copy of this last statement or settlement between the Kern Trading and Oil Company and the [92] Southern Pacific Railroad Company, including copy of statement of all transactions up to that time?

29th. Will you furnish a true copy of all trust deeds given by defendant, the Southern Pacific Railroad Company, and which you claim to be a lien upon the land grant set forth and described in this suit?

30th. Will you give a full, fair and truthful statement of the amount of all bonds outstanding, secured

by said trust deeds?

31st. Who are the present officers and directors of the Southern Pacific Railroad Company of New Mexico?

32nd. Who are the present officers and directors of the Southern Pacific Railroad Company of Arizona?

33rd. Do you know who were the directors and officers of the Southern Pacific Railroad Company during the years, 1892, 1893 and 1894, and will you answer and do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? Will you set forth the same, fully and at large in your answer?

The defendant, the Southern Pacific Company and the Southern Pacific Railroad Company, consolidated, by their officers, are required to answer interrogatory, No. i, 2, 3, 4, 5, 27, 28, 29, 30, 31, 32, 33.

The defendant, the Kern Trading and Oil Company, by its officers, Edwin T. Dumble, George L. King, C. H. Redington, J. E. Foulds, W. A. Worthington, and W. R. Scott, are required to answer interrogatories No. 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28. The defendants, the Southern Pacific Railroad Company, consolidated, as is in this bill more specifically set forth, and the Kern Trading and Oil Company. The defendants W. F. Herrin and E. E. Calvin are required to answer. [93] interrogatories No. 1, 2, 3, 4, 5,

11, 12 and 23, and that all the defendants be required to answer the premises.

1st. WHEREFORE: YOUR ORATORS PRAY:

That a construction and interpretation be had and made by this court of sections 3 and 18 of said Act of Congress, approved July 27th, 1866, and the mandatory joint resolution of Congress, authorizing, instructing, and requiring the Secretary of the Interior of the United States to issue patent to the Southern Pacific Railroad Company of California and "expressly" prescribing what said patents should, and should not contain, approved June 28th, 1870, and the final order or decree, that patent issued, made by the Commissioner of the General Land Office and approved by the Honorable Secretary of the Interior of the United States of America on June 27th, 1894, also the clause in said decree and patent reading as follows:

"Yet excluding and excepting all mineral lands" should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute shall not be construed to include "coal and iron lands" and all of said patent.

2nd. That defendants, and each and all of them, be estopped from claiming any right, title, interest or estate in or to any of the lands involved in this suit.

3rd. That an interlocutory injunction be issued by this court against each, any and all of the defendants herein, their servants, agents, attorneys, employees and all persons in privity with them, and all persons acting under the control, authority or direction of defendants, or either of them, directly or in-

directly, requiring each, all and every one of them, to desist from any interference with the property in dispute, claimed herein, until the final determination of this suit, and that at that time, said injunction be permanent. [94]

4th. That defendants, the Southern Pacific Railroad Company, a corporation, the Equitable Trust Company of New York, Homer S. King, Central Trust Company of New York, a corporation, the Kern Trading and Oil Company, a corporation, may be required to set forth the nature of their respective claims in or to the property involved in this suit, that all adverse claims of defendants may be determined by a decree of this suit and the operating of the patent herein set forth, be restricted and controlled.

5th. That by said decree it be declared and adjudged that defendants, the Southern Pacific Railroad Company of California, a corporation, Homer S. King, Central Trust Company of New York, a corporation, Equitable Trust Company of New York, the Kern Trading and Oil Company, a corporation, has no estate or interest whatever in or to said lands and premises involved in this suit under said patent or any part or parcel thereof, and that the title of plaintiffs is good, and valid, to the property in controversy, subject, however, to the paramount title of the United States of America thereto, and that the operation of the patent herein described, be restricted and controlled.

6th. That defendants be forever enjoined and barred from asserting any claim whatever in or to

said lands and premises, or the minerals therein, adverse to the interests of your orators herein, and for such other and further relief preliminary and final, as to this Court seems most equitable and just, and judgment and decree against defendant herein, the Southern Pacific Railroad Company, a corporation, for their costs and disbursements in this suit.

7th. May it please your Honors to grant unto your orators the writ of subpoena of the United States of America, directed to the Southern Pacific Company, a corporation, the Southern Pacific Railroad Company, a corporation, and the Southern Pacific Railroad [95] Company of New Mexico, a corporation, consolidated; Homer S. King as Trustee. The Central Trust Company of New York, State of New York, a corporation; The Equitable Trust Company of New York, a corporation, the Kern Trading and Oil Company, a corporation, Julius Kruttschnitt, J. H. Wallace, J. L. Willcutt, W. A. Worthington, E. E. Calvin, Edwin T. Dumble, George L. King, C. H. Redington, W. R. Scott, J. E. Foulds, J. A. Jones, William Herrin, I. W. Hellman, James Wilson, F. K. Ainsworth, William Hood, A. K. Van Deventer, Joseph Hellen, William Mahl, commanding them on a certain day and under a certain penalty, to be and appear in this court, then and there to answer the premises, and to stand to, and abide by, such order and decree as may be made against them, and your complainants will ever pray.

T. S. MINOT,
Solicitor for Complainants.

HOKÉ SMITH,
Counsel for Complainants.

State of California,
County of San Francisco,
Northern District of California,
United States of America,—ss.

I, T. S. Minot, being first duly sworn, on my own behalf and on behalf of all the other complainants in the within suit, depose and say: That I am one of the complainants herein, that I have read the foregoing bill of complaint and know the contents thereof, and that the same is true to my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters I believe it to be true.

T. S. MINOT.

Subscribed and sworn to before me this 29th day of March, 1910.

[Seal] L. H. CONDON,
Notary Public in and for the City and County of San Francisco, State of California. [96]

Due service and receipt of a copy of the amended and supplemental bill of complaint in the within entitled suit is hereby admitted in the City and County of San Francisco, State of California, Northern District of California, United States of America, this 29th day of March, 1910.

GUY V. SHOUP and
D. V. COWDEN,
WM. SINGER, Jr.,

Solicitor for Defendants, Southern Pacific Company, Southern Pacific Railroad Company, Homer S. King, as Trustee, The Equitable Trust Company of New York, The Kern Trading and Oil Company.

[Endorsed]: No. 177. In Equity. United States Circuit Court, Ninth Judicial Circuit, Southern District of California, Northern Division. George D. Roberts et al., Complainants, vs. The Southern Pacific Company, a Corporation, et al., Defendants. Amended and Supplemental Bill of Complaint. Filed Mar. 31, 1910. Win. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [97]

[Demurrer of Southern Pacific Company et al.]

Case No. 177.

United States Circuit Court, Ninth Circuit, Northern Division of the Southern District of California.

IN EQUITY.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY et al.,

Defendants.

The Joint and Several Demurrer of the defendants Southern Pacific Company, Southern Pacific Railroad Company, Kern Trading and Oil Company, Equitable Trust Company of New York, and Homer S. King as Trustee, to the Amended and Supplemental Bill of Complaint herein.

These defendants, Southern Pacific Company, Southern Pacific Railroad Company, Kern Trading and Oil Company, Equitable Trust Company of New York, and Homer S. King as Trustee, jointly

and severally, by protestation, not confessing or acknowledging all or any of the matters or things in the said Amended and Supplemental Bill of Complaint to be true in such manner and form as the same are therein set forth and alleged, demur thereto and to the whole thereof, and for cause of demurrer show:

1st. That the said Amended and Supplemental Bill of Complaint does not state a cause of action, or cause of suit, against these defendants, or any of them, within the jurisdiction of this Court.

2nd. That the said Amended and Supplemental Bill of Complaint does not set forth or show any matter, equity, or cause, entitling complainants, or any of them, to file or maintain the same against these defendants, or any of them.

3rd. That the said Amended and Supplemental Bill of Complaint [98] does not set forth or show any matter, equity, or cause, entitling complainants, or any of them, to the discovery thereby sought, required, or prayed, or to any discovery whatsoever, of or from these defendants, or any of them.

4th. That the said Amended and Supplemental Bill of Complaint does not set forth or show any matter, equity, or cause, entitling complainants, or any of them, to the relief thereby sought or prayed, or to any relief whatsoever, of or from these defendants, or any of them.

5th. That it appears by the allegations of the said Amended and Supplemental Bill of Complaint that any cause of action, or cause of suit, shown or sought to be shown thereby, is barred by the first

section of the Act of Congress, approved March 2d, 1896, entitled "An Act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes," printed and published in Volume 29, on page 42 and following, United States Statutes at Large.

6th. That it appears by the allegations of the said Amended and Supplemental Bill of Complaint that any cause of action, or cause of suit, shown or sought to be shown by the said Amended and Supplemental Bill of Complaint is barred by:

- (a). The provisions of section 318 of the Code of Civil Procedure of the State of California.
- (b). The provisions of section 319 of the Code of Civil Procedure of the State of California.
- (c). The provisions of section 320 of the Code of Civil Procedure of the State of California.
- (d). The provisions of section 321 of the Code of Civil Procedure of the State of California.
- (e). The provisions of section 338 of the Code of Civil Procedure of the State of California. [99]
- (f). The provisions of section 343 of the Code of Civil Procedure of the State of California.

7th. That it appears by the allegations of the said Amended and Supplemental Bill of Complaint that any cause of action, or cause of suit, shown or sought to be shown by the said Amended and Supplemental Bill of Complaint, is barred by the long delay and laches of the complainants, and of each of them.

Wherefore, these defendants, jointly and severally, pray the judgment of this Honorable Court

whether they, or any of them, shall make any further or other answer to the said Amended and Supplemental Bill of Complaint, or to any part thereof, or to any matters or things therein set forth; and further pray to be hence dismissed, with their costs in this behalf sustained.

GUY V. SHOUP and
D. V. COWDEN,

Attorneys for the said Defendants.

WM. SINGER, Jr.,

Counsel for the said Defendants.

State of California,

City and County of San Francisco,—ss.

G. L. King makes solemn oath and says: That he is the Secretary of the Southern Pacific Railroad Company, named as one of the defendants in and to the foregoing Joint and Several Demurrer; and that the said Demurrer is not interposed for delay.

G. L. KING.

Subscribed and sworn to before me on April 1st, 1910.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

I hereby certify that, in my opinion, the foregoing Joint and Several Demurrer is well taken in point of law.

WM. SINGER, Jr.,
Counsel for said Defendants. [100]

State of California,
City and County of San Francisco,—ss.

Fred Brauns, being duly sworn, deposes and says: That he is paper-server for and in the office of Wm. Singer, Jr., Room 842 Flood Building, San Francisco, California; that he is over twenty-one years of age; that on April 4th, 1910, he served on T. S. Minot, solicitor for complainants, the foregoing Joint and Several Demurrer of defendants Southern Pacific Company et al., to Complainants' Amended and Supplemental Bill, by delivering a full, true and correct copy thereof to the Clerk and Stenographer in charge of the offices of said T. S. Minot, Rooms 1001 to 1004, Phelan Building, San Francisco, California, and taking her receipt therefor endorsed thereon.

FRED BRAUNS.

Subscribed and sworn to before me on April 4th, 1910.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt, by copy, of the within Demurrer is
hereby admitted on April 4th, 1910.

T. S. MINOT,
Attorney for the Complainants.

[Endorsed]: No. 177. U. S. Circuit Court, Southern District of California, Northern Division. George D. Roberts et al. vs. Southern Pacific Company et al. Joint and Several Demurrer of Def'ts Southern Pac. Co. et al. to Complainants' Amended

and Supplemental Bill. Filed Apr. 6, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Guy V. Shoup and D. V. Cowden, *Attorney for Defendants.* Room 842, Flood Building, San Francisco. [101]

[Demurrer of Central Trust Company of New York.]

Case No. 177.

United States Circuit Court, Ninth Circuit, Northern Division of the Southern District of California.

IN EQUITY.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY et al.,

Defendants.

The demurrer of defendant Central Trust Company of New York to the complainants' amended and supplemental bill of complaint herein.

The defendant Central Trust Company of New York, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended and supplemental bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demurs thereto and to the whole thereof, and for cause of demurrer shows:

1st: That the said amended and supplemental bill of complaint does not state a cause of action, or cause of suit, against this defendant, within the

jurisdiction of this Court.

2nd: That the said amended and supplemental bill of complaint does not set forth or show any matter, equity or cause entitling complainants, or any of them, to file or maintain the same against this defendant.

3d: That the said amended and supplemental bill of complaint does not set forth or show any matter, equity or cause entitling the complainants, or any of them, to the discovery thereby sought, required or prayed, or to any discovery whatsoever, of or from this defendant.

4th: That the said amended and supplemental bill of complaint does not set forth or show any matter, equity or [102] cause entitling complainants, or any of them, to the relief thereby sought or prayed, or to any relief whatsoever, of or from this defendant.

5th: That it appears by the allegations of the said amended and supplemental bill of complaint that any cause of action, or cause of suit, shown or sought to be shown thereby, is barred by the first section of the Act of Congress, approved March 2, 1896, entitled "An Act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes," printed and published in Volume 29, on pages 42 and following, *United States Statutes at Large*.

6th: That it appears by the allegations of the said amended and supplemental bill of complaint that any cause of action, or cause of suit, shown or sought to be shown by the said amended and supplemental

bill of complaint is barred by:

- (a) The provisions of section 318 of the Code of Civil Procedure of the State of California;
- (b) The provisions of section 319 of the Code of Civil Procedure of the State of California;
- (c) The provisions of section 320 of the Code of Civil Procedure of the State of California;
- (d) The provisions of section 321 of the Code of Civil Procedure of the State of California;
- (e) The provisions of section 338 of the Code of Civil Procedure of the State of California;
- (f) The provisions of section 343 of the Code of Civil Procedure of the State of California.

7th. That it appears by the allegations of the said amended and supplemental bill of complaint that any cause of action, or cause of suit, shown or sought to be shown by the said amended and supplemental bill of complaint is barred by the long delay and laches of the complainants, and of each of them. [103]

WHEREFORE, this defendant prays the judgment of this Honorable Court whether it shall make any further or other answer to the said amended and supplemental bill of complaint, or to any part thereof, or to any matters or things therein set forth; and further prays to be hence dismissed, with its costs in this behalf sustained.

HORACE T. PLATT,
RICH'RD BAYNE,

Attorneys for Defendant, Central Trust Company,
of New York.

JOLINE, LARKINS & PETTIBONE,
Of Counsel.

State of New York,
City and County of New York,—ss.

E. Francis Hyde makes solemn oath and says: That he is an officer of the Central Trust Company of New York, named as one of the defendants in and to the foregoing demurrer, to wit, vice-president; that the said demurrer is not interposed for delay.

E. FRANCIS HYDE.

Subscribed and sworn to before me this 11th day of April, 1910.

[Seal] A. S. CAMPBELL,
Notary Public in and for the City and County of
New York, State of New York.

We hereby certify that, in our opinion, the foregoing demurrer is well taken in point of law.

RICH'D BAYNE,
H. T. PLATT,

Counsel for Defendant Central Trust Company of
New York. [104]

State of New York,
County of New York,—ss.

I, WILLIAM F. SCHNEIDER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That

A. S. Campbell,

before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public of New York, dwelling in said county, duly appointed

and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 11 day of Apr., 1910.

[Seal]

WM. F. SCHNEIDER,

Clerk. [105]

[Endorsed]: In Equity. Case No. 177. United States Circuit Court, Ninth Circuit, Northern Division of Southern District of California. George D. Roberts et al., Complainants, vs. Southern Pacific Company et al., Defendants. Demurrer of Defendant Central Trust Company of New York. Service accepted T. S. Minot. Filed Apr. 19, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Platt & Bayne, Attorneys and Counselors at Law, 11th Floor, Crocker Building, San Francisco, Cal.
[106]

[Order Sustaining Demurrsers, etc.]

At a stated term, to wit, the January Term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the city of Los Angeles, on Monday, the thirteenth day of March, in the year of our Lord one thou-

sand nine hundred and eleven. Present: The Honorable ERSKINE M. ROSS, Circuit Judge.

No. 177—N. D.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY et al.,

Defendants.

This cause having heretofore been submitted to the Court for its consideration and decision upon the joint and several demurrer of the defendants, Southern Pacific Company, Southern Pacific Railroad Company, Kern Trading and Oil Company, Equitable Trust Company of New York, and Homer S. King, Trustee, to complainants' amended and supplemental bill of complaint, and on the demurrer of defendant Central Trust Company of New York to complainants' amended and supplemental bill of complaint, and the Court having duly considered the same and being fully advised in the premises, it is now, on this 13th day of March, A. D. 1911, being a day in the January Term, A. D. 1911, by the Court ordered that the demurrs of said defendants be, and they hereby are, sustained, and that the bill of complaint be dismissed at the complainants' cost. [107]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Northern Division.

IN EQUITY—No. 177.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation) et al.,

Defendants.

Decree.

This cause having come on regularly for hearing on the joint and several demurrer of the defendants, Southern Pacific Company, Southern Pacific Railroad Company, Kern Trading and Oil Company, Equitable Trust Company of New York and Homer S. King, as trustees, to complainants' amended and supplemental bill of complaint and on the demurrer of defendant Central Trust Company of New York to complainants' amended and supplemental bill of complaint, and the Court, after hearing arguments of counsel, and after due deliberation thereon, thereafter, on the 13th day of March, 1911, having, by its order made and entered herein, sustained said demurrers, and having further ordered that the bill of complaint be dismissed at complainants' cost;

NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed, that complainants' said bill of

complaint be, and the same hereby is, dismissed, and that said defendants recover from complainants, their, the said defendants costs herein, taxed at \$10.00/100 in favor of defendant Central Trust Company of New York and at \$11.60/100 in favor of the other defendants above named.

Los Angeles, March 21st, 1911.

ROSS,
Circuit Judge.

Decree entered and recorded March 21st, 1911.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk. [108]

[Endorsed]: No. 177. U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. George D. Roberts et al., Complainants, vs. Southern Pacific Company, a Corporation, et al., Defendants. Decree. Filed Mar. 12, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [109]

[Opinion of the Court.]

*In the United States Circuit Court in and for the
Southern District of California, Northern Di-
vision.*

GEORGE D. ROBERTS et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY et als.,
Defendants.

Stripped of the mass of irrelevant and redundant matter contained in the pleadings, the case presented is this: Can a citizen of the United States, or one having declared his intention to become such, lawfully enter upon and claim as mineral ground land theretofore patented by the Government to a railroad company under a congressional grant, such patents, after describing the land thereby conveyed, containing the clause, "Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'Coal and iron land.' "

The complainants' alleged rights to the lands in question in this suit were, according to their express allegation, not acquired until 15 years after the issuance of patents to the Southern Pacific Railroad Company therefor, at which time they claim to have made mineral locations upon them, and by this suit, the nature of which is variously characterized by their counsel, they ask the court to protect their alleged rights as such mineral locators, by some sort of injunctive process, by "controlling" the patents which were issued by the Government, and which they expressly allege conveyed the legal title to the land to the grantee therein named.

If the above-quoted clause inserted in the patents had the [110] effect of excepting from the lands described in the granting clause thereof all of such lands in which mineral might thereafter be found, the discovery of mineral in the lands in suit by the complainants, if such has been made as alleged, 15

years after the issuance of the patents, would undoubtedly defeat the grant under which the defendants hold, for the reason that the clause is without limitation as to time, and a determination by a Court or jury, as the case might be, at any subsequent date, however remote, that any of the land described in the mineral land, would thereby necessarily determine that such land was never within the terms of the railroad grant made by Congress, notwithstanding the fact that the officers of the Government, charged with the duty of inquiring into and determining the question and of issuing the Government patent for the lands granted, had issued such conveyance. A mere statement of the necessary consequences of the complainants' contention is enough to show that it cannot be sound. It would make of the patents a delusion and a snare instead of a muniment of title designed for the peace and security of those holding under them. Undoubtedly, if the lands in suit were known to be mineral lands at the time they were applied for by the railroad company under the Congressional grant to it, and if the patenting of them was, as alleged by the complainants, procured by means of the false affidavit of its land agent, or through any other fraud on its part, the Government, or anyone in privity with the Government, could justly complain and by suit, brought within the time fixed by Congress for that purpose, procure a cancellation of such patents. But this is not such a suit. Neither the Government, nor anyone in privity with the Government title, is here complaining. The suit is by strangers to that title,

for by the express averments [111] of the bill, the complainants' alleged rights were not initiated until years after the issuance of the patents which they expressly allege conveyed to the railroad company the legal title to the lands. That the complainants cannot be heard to complain of the alleged frauds upon the Government is thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the public lands. The only real question, therefore, in the case is whether the lands in suit are excluded from the patents by reason of the alleged subsequent discovery of mineral therein by the complainants, under the exception clause inserted in the patents, already quoted, but which I here repeat:

“Yet excluding and excepting ‘all mineral lands,’ should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include ‘coal and iron lands.’”

Where did the officers of the Government, charged with the duty of issuing patents for lands granted by Congress, get authority to cast upon courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant, which Congress devolved upon the Land Department of the Government as a prerequisite to the issuance of a patent therefor? The statutes of the United States will be searched in vain for any such authority, unless it can be deduced from the Joint Resolution of Congress of June 28,

1870 (16 Stats. 382), relating to the grant to the Southern Pacific Railroad Company made by its preceding act of July 27, 1866 (14 Stats. 292).

By the latter act Congress chartered the Atlantic and Pacific Railroad Company, empowered it to build a railroad commencing at a point at or near Springfield, Missouri, along a generally [112] described route to the Colorado River, and, after crossing that river, by the most practicable and eligible route to the Pacific Ocean—granting to such company by the third section of the Act:

“Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the general land office.”

The 18th section of the Act made a grant to the Southern Pacific Railroad Company, and is as follows:

“And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Rail-

road, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

By section 4 of the Act it was provided that whenever the Railroad Company "shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the [113] service contemplated, the President of the United States shall appoint three Commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid,

and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

As recited in the foregoing Act of Congress, the Southern Pacific Railroad Company was a corporation of the State of California, and by its charter was authorized to build a railroad "from some point on the Bay of San Francisco, in the State of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the eastern line of said State of California, there to connect with a contemplated railroad from said eastern line of the State of California to the Mississippi River."

The Act of 1866, as has been seen, authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad "at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco." That company undertook to lay out a different [114] route from that designated in its articles of incorporation, and on the 3d day of January, 1867, filed with the Commissioner of the General Land Office a map showing the line of route so adopted by the company, and on the 4th of the succeeding month the then Secretary of the Interior directed the Commissioner of the General Land Office to cause to be withdrawn from sale or disposal the odd sections within the granted limits of twenty miles on each side of the road, as shown on

the map so filed January 3, 1867, and also the odd sections outside of the twenty miles and within thirty miles on each side of the said route, from which indemnity for land otherwise disposed of by the Government within the granted limits should be taken. July 14, 1868, the said order of withdrawal was revoked and the lands included therein were opened to sale. On the 20th of August following the latter order was suspended, so far as it related to lands south of San Jose, California, and November 2 and 11, 1869, the then Secretary of the Interior revoked the suspension of August 20, 1868, and directed the restoration to sale, after sixty days notice, of the lands included in the suspension order. On the 15th of the next month the orders of November 2 and 11, made the preceding month, were suspended. (*Opinions of Attorney General*, Vol. 16, pp. 80-89.) July 25, 1868, the time for the construction of the road by the Southern Pacific Railroad Company was extended by Congress (15 Stats. 187), and on June 28, 1870, Congress passed the Joint Resolution in question, which is here set out in full:

“Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said [115] road, in the manner and within the time provided by law,

and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the *repo* of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

In their brief counsel for the complainants ask the Court to "account for, explain, construe, interpret and apply" the foregoing saving clause. The reason for and purpose of it is quite fully set forth in the debate in the Senate upon the resolution, where it was first introduced. (Congressional Record, part V, 2d Session, 41 Congress 1869-1870, pp. 3950, 3951, 3952, 3953.)

While asking the Court to account for and explain the clause counsel at the same time assert that the Court is not at liberty to refer to the debate in the Senate upon the subject. It is quite true that the meaning of the clause is to be determined from the

language used by Congress, but counsel are mistaken in supposing and asserting it to be improper for the Court to refer to the debate. In *Binns vs. United States*, 194 U. S. 486, 495, the Supreme Court said:

"While it is generally true that debates in Congress are [116] not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, *United States vs. Freight Association*, 166 U. S. 290, 318, yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports. *Holy Trinity Church vs. United States*, 143 U. S. 457, 464. When sections 461 and 462 were under consideration in the Senate the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

'The Committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the Government of the Territory of Alaska. * * * They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of

Alaska, including the Governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.' Vol. 32, Congressional Record, Part III, page 2235."

In Jennison vs. Kirk, 98 U. S. 453, 459, the same court, in construing an act of Congress and in referring to and setting forth certain statements of one of the Senators made in the Senate, said:

"These statements of the author of the act in advocating its [117] adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the Act."

In the case of People vs. Stephens, 62 Cal. 209, 235, 236, the Supreme Court of California, in construing one of the provisions of the constitution of the State, referred to the purpose of the provision as explained in the debates in the constitutional convention by the member at whose instance it was inserted and became a part of the constitution. See, also, Wadsworth vs. Boisen, 148 Fed. 771, 778; Ho Ah Kow vs. Nunan, Fed. Case No. 6546.

Turning to the debate in the Senate upon the saving clause added to the joint resolution of June 28, 1870, it is readily seen that its purpose was to protect those settlers who had located upon public lands

along the line of the proposed changed route of the Southern Pacific Railroad Company, as indicated by the map filed by that company in the General Land Office on the 3d of January, 1867. By the Joint Resolution Congress sanctioned the change of route and made to the Southern Pacific Railroad Company a precisely similar grant of land on each side of that line that it had made to the same company by the 18th section of the act of July 27, 1866, on each side of the line of road therein authorized; but to protect not only those who had acquired or might acquire prior to the attaching of the grant a legal right to lands along the line of the changed route, but also all *actual* settlers thereon, Congress provided in and by the Joint Resolution that the change of route thereby authorized and the grant of lands thereby made should not affect the rights of any actual settler, and further that the grant of lands thereby made to the Southern Pacific Railroad Company along the new route was [118] and should be subject to the same conditions and restrictions as applied to the original grant made to that company in and by the act of July 27, 1866—the language of the Joint Resolution being, as has been seen: “Expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.”

Those conditions and restrictions are specifically stated in the Act of 1866 and are, in substance, that the grant should not apply to any mineral land nor to any land reserved, sold, granted or otherwise

appropriated, nor to any land to which the United States did not have full title and which was not free from pre-emption or other claims or right at the time the line of the road should be designated by a plat thereof filed in the office of the Commissioner of the General Land Office. Such are the express provisions of the grant of July 27, 1866, expressly referred to in the Joint Resolution for the conditions and restrictions of the grant of the lands thereby made along the line of road thereby authorized to be built. There is absolutely nothing in the saving clause of the Joint Resolution, in my opinion, either requiring or authorizing the patents thereby directed to be issued for the granted lands to contain those conditions or restrictions, or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by Congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainants' counsel is correct, that by the Joint Resolution of June 28, 1870, Congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, [119] and all land to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of the grantee's road was designated by a plat

thereof filed in the office of the Commissioner of the General Land Office. There is no escape from this conclusion for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none. The result is that, according to the contention of counsel for the complainants, we would have Congress providing for the issuance of Government patents for lands under its grant which upon their face would leave open for all time, to be decided by courts or juries, as the case might be, not only the question as to the character of the land patented but also as to whether it had been reserved, sold, granted or otherwise appropriated, and as to whether the United States had full title, and whether it was free from pre-emption or other claims or rights at the time the railroad company designated the line of its road by filing a plat thereof in the office of the Commissioner of the General Land Office. As a matter of course, Congress never intended anything of the sort, and there is nothing in the acts in question nor in any other grant to any railroad company that has ever come under my observation, or in any decision of the Supreme Court, that gives any support to any such conclusion.

The patent was the last step in the proceedings provided for by Congress and was designed, as the statute expressly declares, to convey the Government title to the grantee. Of what avail would such

an instrument, intended for the peace and security of the holder, be if the antecedent facts upon which it is required to be based are open to subsequent inquiry and contestation by [120] strangers to the title? As well might it be contended that questions of fact in respect to the marking of the boundaries of a patented mining claim or the previous discovery of mineral therein, or any other fact made essential by the statute to the issuance of a mining patent, are open to inquiry by the court subsequent to its issue. In respect to such a contention this Court said in the case of Doe vs. Waterloo Mining Co., 54 Fed. 935, 940:

“If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. All such matters I understand to be absolutely concluded by the patent so long as it stands unrevoked. If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode, or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the

claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based."

Great reliance is placed by counsel for the complainants on this clause from the opinion of the Supreme Court in the case of Barden vs. Northern Pacific Railroad Co., 154 U. S. 288; [121]

"The delay of the Government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert, in the meantime, by possessory action (as held in Deseret Salt Company vs. Tarpey, 142 U. S. 241), its right to lands which are in fact nonmineral. But such delay, as well observed, cannot have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein."

The observation that "the Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the pat-

ent" is very far from saying, much less deciding, that a patent issued for lands in pursuance of such a grant must or may except from the lands described in the granting clause thereof all mineral lands. The Court could not have so decided in that case, for there was no such question before the Court, and could not have been, as no patent had been issued in the case there under consideration. It was an action by the Northern Pacific Railroad Company to recover certain lands, confessedly mineral in character, as a part of its land grant, which grant, like the one here in question, excluded all mineral lands therefrom, on the ground that when that grant became attached to the various sections within it by the definite location of the company's line of road, the land in suit was not known to be mineral land; and [122] the question in the case, as will be readily seen from the prevailing as well as the dissenting opinions, was whether the fact entitled the railroad company to the land sued for as part of its grant, or whether such land was excluded from the grant by the discovery of its mineral character at any time prior to the issuance of the Government patent therefor. The majority of the Court held that the character of the land was open to inquiry at any time prior to the issuance of the patent, and that the discovery of its mineral character at any time before it was patented necessarily excluded it from the grant, because the grant was of nonmineral land only. But the Court in the prevailing opinion distinctly pointed out that the duty of ascertaining and determining the character of the land rested upon the officers of the Land

Department, and there is, I think, nothing in it even tending to show that that or any other matter of fact could be left by them to the ascertainment and determination of a court or jury subsequent to the issuance of the Government patent. The Court said:

"The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands or mineral [123] lands, and so designate them in the patent which it issues. The Act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance.

"It is the established doctrine, expressed in numerous decisions of this Court, that wherever Con-

gress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.

"In *Smelting Co. vs. Kemp*, 104 U. S. 636, 640, 641, this court thus spoke of the Land Department in the transfer of public lands: 'The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the Land Department, as part of the administrative and executive branch of the Government, has been created to supervise all the various proceedings taken to obtain title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive, [124] when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special

tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law.'

"In *Steele vs. Smelting Co.*, 106 U. S. 447, 450, the language of the Court was that: 'The Land Department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.'

"In *Heath vs. Wallace*, 138 U. S. 573, 585, it was held that 'the question whether or not lands returned

as "subject to periodical overflow" are "swamp and overflowed lands" is a question of fact properly determinable by the Land Department.' And Mr. Justice Lamar added: 'It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of [125] that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.' If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight vs. Land Association*, 142 U. S. 161, 178, as the 'supervising agent of the Government to do justice to all claims and preserve the rights of the people of the United States,' by certifying the list until corrected

in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge [126] of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

"In the case of the Central Pacific Railroad Company vs. Valentine, 11 Land Dec. 238, 246, the late Secretary of the Interior, Mr. Noble, speaks of the practice of the Land Department in issuing patents to railroad lands. His language is: 'The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction

it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.'

"It is true that the patent has been issued in many instances without the investigation and consideration which the public [127] interest requires; but if that has been done without fraud, though unadvisedly by officers of the Government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the Government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the Government to the grantees, reposes in officers of the Land Depart-

ment. Until such patent is issued, defining the character of the land granted and showing that it is nonmineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to nonmineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were nonmineral, would, unless set aside and annulled by direct proceedings, estop the Government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

I do not find in this language of the prevailing opinion in the Barden case any support for the contention of the complainant's counsel that the officers of the Land Department were required or authorized to insert in the patents here in question, or in any other similar patent, after describing the lands falling within the railroad grant, a clause "excluding and excepting all mineral lands, should any such be found in the tracts aforesaid." And that the Supreme Court itself takes the same view of the decision in the Barden case is, I think, shown by its reference thereto in the case of Shaw vs. Kellogg, 170 U. S. 313, [128] where, at page 339, it says:

"Defendant relies largely on the decision of this court in Barden vs. Northern Pacific Railroad, 154 U. S. 288, in which it was held that lands identified

by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the nonmineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be ‘construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,’ held that the question of mineral or nonmineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals.”

I am also of the opinion that the case last referred to—Shaw vs. Kellogg—is direct authority for the proposition that the officers of the Land Department had no authority to insert in the patents under consideration the clause excepting from the lands described in its granting clause “all mineral lands should any such be found in the tracts aforesaid.”

The grant involved in Shaw vs. Kellogg was made by section 6 of an act of Congress passed June 21, 1860 (12 Stats. 71), in settlement of a claim [129] under a Mexican grant to land in the vicinity of Los Vegas by which the claimants were given an equal amount of nonmineral and vacant land to be by them elsewhere selected in the territory of New Mexico, to be located in a certain form and within a certain time. It was by the act made the duty of the surveyor general of New Mexico to make survey and location of the land so selected. The grantees made their selection and applied for the land. Certain correspondence occurred between the Land Department and the surveyor general in respect to the form of the application and in respect to the evidence relating to the character of the land, that is to say, whether or not it was mineral land, which resulted in the Land Department instructing the surveyor general to approve the selection and make a survey thereof. The Land Department subsequently approved the survey, field-notes and plat of the surveyor general, but in doing so added the words, "Subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860," which, as has been seen, excluded mineral land from the grant. The Act of Congress did not provide for the issuance of a patent, but the Land Department noted on its maps that this tract had been segregated from the public domain and had become private property and so reported to Congress, which never questioned the validity of such action. The grantees were also notified and took possession of the land.

Many years afterward a portion of it was claimed as mineral land by a party whose contentions were thus stated by the Supreme Court in its opinion:

“These contentions are that Congress granted only nonmineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued, and therefore the legal title has never passed from the Government; that the Land Department never adjudicated that this was nonmineral land, but on the contrary [130] simply approved the location, subject to the conditions and provisions of the act of Congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of mineral within the tract.”

In considering the limitation undertaken to be imposed by the Land Department upon its approval of the selection of the land by the grantees and the surveyor general’s survey, field-notes and plat thereof, the Supreme Court said:

“What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant,

authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of Congress in respect to homestead, pre-emption and townsite locations provide that they shall be made upon lands that are nonmineral, [131] and in approving any such entry and issuing a patent therefor, could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in *Deffeback vs. Hawks*, *supra*, 406:

“ ‘The position that the patent to the plaintiff should have contained a reservation excluding from its operation all building and improvements not belonging to him, and all rights necessary or proper

to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.' "

It results from what has been said that the demurrs must be, and are, sustained and the bills dismissed at the complainants' costs.

ROSS,
Circuit Judge.

[Endorsed]: No. 177. In the United States Circuit Court, Ninth Judicial Circuit, Southern District of California, Northern Division. George D. Roberts et al. vs. Southern Pacific Company et al. Opinion of the Court. Filed Mar. 13, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [132]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

IN EQUITY—No. 177.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation) et al.,

Defendants.

**Order [Entering Francis J. Heney, B. D. Townsend
and A. H. Blatchley on the Records as Solicitors
for Complainants].**

Upon the verified petition of James B. Sweeney, one of the complainants in the above-entitled suit, and upon the affidavits of Francis J. Heney and A. H. Blatchley, and upon the process, subpoena, bill of complaint, findings, order, judgment and all other papers heretofore served and now on file in the office of the Clerk of said Court in the above-entitled suit, and upon motion of Francis J. Heney and A. H. Blatchley,

IT IS ORDERED That the names of B. D. Townsend, Francis J. Heney and A. H. Blatchley be spread upon the records in the above-entitled suit as solicitors for the above-named complainants, and that they be and are hereby given full power and authority to act for and do all things for and on behalf of said complainants, as such solicitors, as though originally appearing therein.

Dated, this 29th day of April, A. D. 1911.

By the Court,

WM. W. MORROW,
Circuit Judge.

[Endorsed]: 177 U. S. Circuit Court, So. Dist. of California, George D. Roberts et al. vs. Southern Pacific Co. et al. Order That Names of B. D. Townsend, Francis J. Heney and A. H. Blatchley be Spread on Record as Solicitors. Filed April 29th, 1911. Wm. M. Van Dyke, Clerk. [133]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

IN EQUITY—No. 177.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation) et al.,

Defendants.

**Stipulation [That Hearing of Rule to Show Cause
be Heard Before the Hon. Wm. W. Morrow.]**

IT IS HEREBY STIPULATED AND MUTUALLY AGREED by and between the parties to the above-entitled suit, that the hearing of the rule to show cause, hereto annexed, may be heard before the Hon. WILLIAM W. MORROW, at his court-room at the City and County of San Francisco, State of California, on the 29th day of April, 1911, instead of in the United States Circuit Court, Southern District of California, and that any rule, order, judgment or decree made thereon, shall have the same binding force and effect as though made in said United States Circuit Court, Southern District of California.

Dated April 24, 1911.

FRANCIS J. HENEY,

A. H. BLATCHLEY,

Solicitors for Complainants.

WM. SINGER, Jr.,

D. V. COWDEN and

GUY V. SHOUP,

Solicitors for Defendants. [134]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

IN EQUITY—No. 177.

GEORGE D. ROBERTS, Z. L. PHELPS, JAMES MAYNARD, Jr., A. M. ANDERSON, T. S. MINOT, NEWTON A. JOHNSON, DAVID EWING, W. HERBERT GATES, W. M. JOHNSON, S. J. GALLAGHER, O. D. LOFTUS, THOMAS BARRETT, Sr., H. E. AYERS, JAMES P. SWEENEY, CHALK ROBERTS, ROBERT RENDALL, MILO L. ROWELL, H. T. FAUST, JAMES WARD, J. L. D. WALP, FRED E. WINDSOR, M. J. COREY, J. W. WARNER, CLAUD BARNES, W. H. FRASER, ASH SERVICE, SAMUEL MARSHBACK, W. W. WICKLINE, J. M. ROBERTSON, P. C. TAYLOR, HENRY GREENLEAF, R. M. COOK, I. W. ALEXANDER, J. W. SWARTZLANDER, HENRY BARADA and E. M SCOTT (a Voluntary Unincorporated Association),

Complainants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation), (THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA (a Corporation), and THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA (a Corporation), and THE SOUTHERN PA-

CIFIC RAILROAD COMPANY OF NEW MEXICO (a Corporation), Consolidated) and HOMER S. KING, as Trustee, THE [135] CENTRAL TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE KERN TRADING AND OIL COMPANY, (a Corporation), JULIUS KRUTTSCHNITT, J. H. WALLACE, J. L. WILLCUTT, W. A. WORTHINGTON, E. E. CALVIN, EDWARD T. DUMBLE, GEORGE L. KING, C. H. REDINGTON, W. R. SCOTT, J. E. FOULDS, J. A. JONES, WILLIAM F. HERRIN, I. W. HELLMAN, JAMES WILSON, E K. AINSWORTH, WILLIAM HOOD, A. K. VANDENTER, JOSEPH HELLEN and WILLIAM MAHL,

Defendants.

**Petition to Make Francis J. Heney et al. Solicitors,
to Set Aside and Amend Findings, etc.].**

To the Honorable WM. W. MORROW, United States Circuit Judge, District of California:

The petition of James P. Sweeney respectfully alleges, represents and shows to this Honorable Court, that he is one of the complainants in the above-entitled suit and makes this petition for and on his own behalf, and for *an* on behalf of all of the other complainants therein.

Your petitioner further says that a Bill of Complaint in said suit was heretofore served and filed by

one, T. S. Minot, solicitor for all of said complainants, and that thereafter there was interposed, on behalf of the defendants to said suit, demurrers to said Bill of Complaint.

Your petitioner further alleges and shows to your Honor that thereafter there was a hearing and argument upon the issues thus formed by said Bill of Complaint and demurrer thereto, and such proceedings had therein, that on the 13th day of March, [136] A. D. 1911, there was made, entered and filed therein by the Honorable Erskine M. Ross, sitting and presiding in and over the United States Circuit Court, Ninth Judicial Circuit, Southern District of California, Northern Division, an Order or Decree sustaining defendants' said demurrer to said Bill of Complaint and dismissing the Bill of said complainants with costs.

That thereafter such proceedings were had therein, that on the 21st day of March, A. D. 1911, there was made, entered and filed in said suit, a final decree and judgment, in and by the terms of which it was ordered and adjudged that complainants' said Bill of Complaint be, and the same was, thereby dismissed, with costs taxed at ten dollars in favor of defendant, Central Trust Company of New York, and at eleven dollars and sixty cents in favor of the other defendants above named.

Deponent further says, that since the commencement of said action, one, B. D. Townsend, has been retained and employed by and on behalf of said complainants, as solicitor therein, and that since the making, entry and filing of said judgment and decree of

March 21st, 1911, Francis J. Heney and A. H. Blatchley, have been retained and employed by the said complainants, as solicitors in the above-entitled suit.

Your petitioner further shows to your Honor, that there was no request or motion made by or on behalf of said complainants at the time of the announcement of the aforesaid decision and order, for leave to plead over, or to take proofs, or to go to a hearing upon the facts, and that since the employment of the said B. D. Townsend, Francis J. Heney and A. H. Blatchley, as such solicitors, he has made a full, fair and complete statement of the suit to said solicitors, and particularly to the said Francis J. Heney and A. H. Blatchley, and that he is advised by his said solicitors, that the order, judgment and decree in said suit is a final determination thereof, and would and does constitute [137] *res adjudicata*, and that he is further advised by the said Francis J. Heney and A. H. Blatchley, that if said Bill of Complaint is or was demurrable, it was due to form merely and not to the substance thereof.

Your petitioner further avers and shows to your Honor, that this application is made in good faith and not for the purpose of delay or annoyance.

WHEREFORE YOUR PETITIONER PRAYS:

FIRST: An order may be entered and made adding to and spreading upon the records in the above-entitled suit, as solicitors for complainants therein, the names of B. D. Townsend, Francis J. Heney and A. H. Blatchley, and that they be given full power and authority to act for and take all steps on behalf

of said complainants, as though originally appearing therein.

SECOND: That the findings and order of the said Honorable Erskine M. Ross, heretofore announced, made, entered, recorded and filed on the 13th day of March, 1911, together with the order, judgment and decree made, entered, recorded and filed on the 21st day of March, 1911, in said suit, be set aside, or changed, amended and modified by supplementing and adding thereto, a provision giving and granting unto said complainants, the right to plead over and serve and file an amended Bill of Complaint in said suit, without prejudice, within such time and upon such terms and conditions as may be just and equitable, or

THIRD: In the alternative, that the aforesaid findings, and the aforesaid order, judgment and decree in said suit, be changed, amended and modified, ~~by~~ supplementing and adding thereto, a provision by which said complainants' said Bill shall be dismissed without prejudice to their rights therein to bring and maintain a subsequent suit, the same as though the aforesaid [138] suit, had never been brought.

JAS. P. SWEENEY,

Petitioner and One of Complainants Above Named.

State of California,

City and County of San Francisco,—ss.

James P. Sweeney, one of the complainants in the above-entitled action, being first duly sworn, deposes and says:

That he is one of the complainants in the above-entitled action; that he has read the foregoing peti-

tion and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

JAS. P. SWEENEY.

Subscribed and sworn to before me this 22d day of April, 1911.

[Seal] L. H. CONDON,
Notary Public in and for the City and County of San Francisco, State of California. [139]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

No. 177.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation) et al.,

Defendants.

Affidavit of Francis J. Heney and A. H. Blatchley.

State of California,

City and County of San Francisco,—ss.

Francis J. Heney and A. H. Blatchley, being each for himself first severally, duly sworn, on oath, doth each for himself, depose and say:

That he has read the petition of the complainant,

James P. Sweeney, hereto annexed, and knows the contents thereof; that neither of these deponents was retained or employed for or on behalf of the complainants in the above-entitled suit until after the 21st day of March, 1911, and that neither of them has been informed of the facts in said suit until within a few days last past.

That he knows of his own knowledge the truth of the statements contained in the said petition hereto annexed as to the proceeding therein had in court, and for greater certainty hereby refers to the process, pleadings, records and papers now on file in the office of the clerk of said court.

That he did inform the said James P. Sweeney, said petitioner, that the findings, order, judgment and decree made and entered in said suit, as in said petition set forth would and does constitute an adjudication of the matters in the said Bill [140] of Complaint contained, and would prohibit and prevent the maintaining of any subsequent suit between the same parties or those in privity with them, relative to the cause or causes of suit therein contained.

That the said James P. Sweeney has made a full, fair and complete statement of the case to him, and while the said Bill of Complaint in said suit may have been defective and demurrable as to form, deponent believes the cause of complaint therein stated on behalf of said complainants, to be a good and meritorious cause of complaint, in substance, and that said complainants should, in justice and equity, be given the right to plead over, or that the Bill of Complaint should be dismissed without prejudice to the bring-

ing and maintaining of another suit.

That in support of and as one of the reasons for the statement last aforesaid on the part of these deponents, is that a suit was heretofore commenced by one, Edmund Burke, against the Southern Pacific Railroad Company, and some of the other defendants in this suit and the cause of complaint set forth and contained in the Bill of Complaint in said suit, was, in substance, identical with that contained in the instant suit;

That to said Bill of Complaint the said defendants interposed demurrers the same as in the instant case, and the Honorable Erskine M. Ross, the Judge before whom said suit was pending, sustained the said demurrers thereto as in the instant case, whereupon said complainant Edmund Burke, appealed said decision to the United States Circuit Court of Appeals and said suit is there pending at the present time and a decision is expected sometime during the present year and that the decision of said Appellate Court therein, would, and will be controlling as to the present suit.

That this motion is made in good faith and not for the [141] purpose or delay or annoyance to the said defendants, or any of them.

FRANCIS J. HENEY.

A. H. BLATCHLEY.

Subscribed and sworn to before me this 22d day of April, 1911.

[Seal] L. H. CONDON,
Notary Public in and for the City and County of San Francisco, State of California. [142]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

IN EQUITY—No. 177.

GEORGE D. ROBERTS, Z. L. PHELPS, JAMES
MAYNARD, Jr., A. M. ANDERSON, T. S.
MINOT, NEWTON A. JOHNSON, DAVID
EWING, W. HERBERT T. GATES, W. M.
JOHNSON, S. J. GALLAGHER, O. D. LOF-
TUS, THOMAS BARRETT, Sr., H. E.
AYERS, JAMES P. SWEENEY, CHALK
ROBERTS, ROBERT RENDALL, MILO L.
ROWELL, H. T. FAUST, JAMES WARD, J.
L. D. WALP, FRED E. WINDSOR, M.
J. COREY, J. W. WARNER, CLAUD
BARNES, W. H. FRASER, ASH SERVICE,
SAMUEL MARSHBACK, W. W. WICK-
LINE, J. M. ROBERTSON, P. C. TAYLOR,
HENRY GREENLEAF, R. M. COOK, I. W.
ALEXANDER, J. W. SWARTZLANDER,
HENRY BARADA and E. M. SCOTT (a Vol-
untary Unincorporated Association),

Complainants,

vs.

'THE SOUTHERN PACIFIC COMPANY (a Corpo-
ration), (THE SOUTHERN PACIFIC RAIL-
ROAD COMPANY OF CALIFORNIA (a
Corporation), and THE SOUTHERN PACI-
FIC RAILROAD COMPANY OF ARIZONA
(a Corporation), and THE SOUTHERN PA-

CIFIC RAILROAD COMPANY OF NEW MEXICO (a Corporation), Consolidated) and HOMER [143] S. KING, as Trustee, THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE KERN TRADING AND OIL COMPANY (a Corporation), JULIUS KRUTTSCHNITT, J. H. WALLACE, J. L. WILLCUTT, W. A. WORTHINGTON, E. E. CALVIN, EDWARD T. DUMBLE, GEORGE L. KING, C. H. REDINGTON, W. R. SCOTT, J. E. FOULDS, J. A. JONES, WILLIAM F. HERRIN, I. W. HELLMAN, JAMES WILSON, E. K. AINSWORTH, WILLIAM HOOD, A. K. VANDEVENTER, JOSEPH HELLEN and WILLIAM MAHL,

Defendants.

Order [to Show Cause].

Upon the process, subpoena, bill of complaint of the complainants' demurrers, findings and order heretofore, on the 13th day of March, 1911, announced, made, entered and filed in the office of the Clerk of said court, in the above-entitled suit, and the order, judgment and decree, heretofore on the 21st day of March, 1911, made, entered and filed in the office of the Clerk of said court, in said suit and upon the verified petition of James P. Sweeney, one of the complainants, and the affidavits of Francis J. Heney and A. H. Blatchley, solicitors for the said complain-

ants; and upon all the papers and documents heretofore served in said suit and now on file in the office of the Clerk of said court; and upon motion of B. D. Townsend, Francis J. Heney and A. H. Blatchley, solicitors for the complainants, in the above-entitled suit,

IT IS ORDERED, that the said defendants and each and all of them show cause, if any they may have, before the Court, presided over by the HONORABLE WM. W. MORROW at his courtroom, at San Francisco, State of California, on the 29th day of April, 1911, at [144] the opening of court on that day or as soon thereafter as counsel can be heard, why an order should not be made and entered as follows, to wit:

FIRST: Modifying, setting aside and amending the findings and order of the Honorable ERSKINE M. ROSS, heretofore on the 13th day of March, 1911, announced, made, entered, recorded and filed, and also setting aside, changing, modifying and amending the order, judgment and decree heretofore, on the 21st day of March, 1911, made, entered, filed and recorded in the office of the Clerk of said Court in the above-entitled suit, by supplementing and adding thereto, a provision giving and granting unto said complainants, the right to plead over and serve and file an amended bill of complaint in said suit, within such time and upon such terms and conditions as may seem just and equitable, or

SECOND: In the alternative, setting aside, changing, modifying and amending the aforesaid findings, order, judgment and decree in said suit by

supplementing and adding to each of them a provision by which said complainants' said bill of complaint shall be dismissed without prejudice to their rights therein to bring and maintain a subsequent suit on their said cause of complaint against said defendants or those in privity to or with them the same as though the aforesaid suit had never been brought.

That a copy of this said rule to show cause, together with a copy of the petition and affidavits, be served upon Guy V. Shoup, D. V. Cowdery and William Singer, Jr., the counsel and attorneys for said defendants on or before the 25 day of April, 1911, and the time for serving such notice is shortened accordingly, and in case that either or any of said attorneys and solicitors for said defendants, should be outside of the city of San Francisco, and his address shall be known, that notice of this [145] said rule to show cause, may be given by delivery to a telegraph office, for the transmitting of the same, duly paid for in advance thereon, a notice addressed to said attorney, stating the time and place where said hearing shall be had, and giving the title of the suit sufficiently to advise said attorney of the nature of the matter to be heard.

Dated this 24 day of April, 1911.

WM. W. MORROW,
Circuit Judge,
Judge.

[Endorsed]: No. 177. In the Circuit Court of the United States of America in and for the Southern District of California, Northern Division, Ninth Circuit. George D. Roberts et al., Complainants, vs.

The Southern Pacific Company, a Corporation, et al., Defendants. Petition, Affidavits and Order. Received April 25, 1911. By J. A. Schaertzer. Filed April 29th, 1911. Wm. M. Van Dyke, Clerk. [146]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

IN EQUITY—No. 177.

GEORGE D. ROBERTS, Z. L. PHELPS, JAMES MAYNARD, Jr., A. M. ANDERSON, T. S. MINOT, NEWTON A. JOHNSON, DAVID EWING, W. HERBERT GATES, W. M. JOHNSON, S. J. GALLAGHER, O. D. LOFTUS, THOMAS BARRETT, Sr., H. E. AYERS, JAMES P. SWEENEY, CHALK ROBERTS, ROBERT RENDALL, MILO L. ROWELL, H. T. FAUST, JAMES WARD, J. L. D. WALP, FRED E. WINDSOR, M. J. COREY, J. W. WARNER, CLAUD BARNES, W. H. FRASER, ASH SERVICE, SAMUEL MARSHBACK, W. W. WICKLINE, J. M. ROBERTSON, P. C. TAYLOR, HENRY GREENLEAF, R. M. COOK, I. W. ALEXANDER, J. W. SWARTZLANDER, HENRY BARADA and E. M. SCOTT (a Voluntary Unincorporated Association),

Complainants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation), (THE SOUTHERN PACIFIC

RAILROAD COMPANY OF CALIFORNIA (a Corporation), and THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA (a Corporation), and THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO (a Corporation), Consolidated), and [147] HOMER S. KING, as Trustee, THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE EQUITABLE TRUST COMPANY of NEW YORK, State of New York (a Corporation), THE KERN TRADING AND OIL COMPANY (a Corporation), JULIUS KRUTTSCHNITT, J. H. WALLACE, J. L. WILLCUTT, W. A. WORTHINGTON, E. E. CALVIN, EDWARD T. DUMBLE, GEORGE L. KING, C. H. REDINGTON, W. R. SCOTT, J. E. FOULDS, J. A. JONES, WILLIAM F. HERRIN, I. W. HELLMAN, JAMES WILSON, E. K. AINSWORTH, WILLIAM HOOD, A. K. VAN DEVENTER, JOSEPH HELLEN, and WILLIAM MAHL,

Defendants.

Order [Permitting Filing of Amended Bill of Complaint, etc.].

THIS MATTER COMING ON TO BE HEARD AT THIS TIME UPON MOTTON AND A RULE TO SHOW CAUSE dated on the 24th day of April, A. D. 1911, and upon the process, subpoena, amended and supplemental bill of complaint of the above-named complainants in the above-entitled suit,

demurrs of the defendants thereto, findings, opinion and order heretofore, on the 13th day of March, A. D. 1911, announced, made, entered and filed in the office of the Clerk of said Court, and the order, judgment and decree heretofore, on the 21st day of March, A. D. 1911, made, entered, filed and recorded in the office of the Clerk of said Court in said suit, and upon the written stipulations of the parties to said suit by their respective counsel, and the verified petition of James P. Sweeney, one of the said complainants, and the affidavits of Francis J. Heney and A. H. Blatchley, and upon all of [148] the papers and documents heretofore served, in said suit and now on file in the office of the Clerk of said Court, and after hearing the arguments of counsel and solicitors for said parties, A. H. Blatchley, appearing upon said motion as solicitor and counsel for said complainants, and Guy V. Shoup and D. V. Cowdery, as solicitors and counsel for said defendants, and the Court being fully advised in the premises,

NOW, upon motion of B. D. Townsend, Francis J. Heney and A. H. Blatchley, solicitors and counsel for said complainants,

IT IS ORDERED, That the complainants herein be permitted to serve and file their amended bill of complaint herewith presented, in the above-entitled suit, and that said amended bill of complaint stand in lieu of the former amended and supplemental bill heretofore filed therein, and that the demurrs heretofore interposed on the part of said defendants stand as the demurrs to said amended bill of com-

plaint this day filed in the office of the Clerk of the said Court.

IT IS FURTHER ORDERED, That the opinion and order of the HONORABLE ERSKINE M. ROSS, heretofore made, entered, recorded and filed in the office of the Clerk of said Court, on the 13th day of March, A. D. 1911, in said suit, and the judgment and decree therein, heretofore, on the 21st day of March, A. D. 1911, made, entered, recorded and filed, without other or further amendment of either, stand as the opinion, order, judgment and decree of this court upon the issue formed by said bill of complaint amended as aforesaid and the demurrers thereto.

IT IS FURTHER ORDERED, That in case of an appeal from the aforesaid judgment and decree, by any of the parties to said suit, that the amended and supplemental bill of complainants to which said demurrers had been originally interposed on the part of defendants, be made a part of the record of such appeal, as well as the amended bill of complaint this day served and filed [149] in said suit.

Dated this 29th day of April, A. D. 1911.

By the Court,

WM. W. MORROW,

Circuit Judge.

O. K.—D. V. COWDEN.

[Endorsed]: No. 177. In Equity. United States Circuit Court, Ninth Judicial Circuit, Southern District of California, Northern Division. George D. Roberts et al., Complainants, vs. The Southern Pacific Company, a Corporation, et al., Defendants.

Order Permitting Filing of Amended and Supplemental Bill of Complaint. Filed May 4, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. B. D. Townsend, Francis J. Heney and A. H. Blatchley, Solicitors for Complainants. [150]

[Amended Bill (in the Nature of a Supplemental Bill).]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

No. 177—BILL IN EQUITY.

GEORGE D. ROBERTS, Z. L. PHELPS, JAMES MAYNARD, Jr., A. M. ANDERSON, T. S. MINOT, NEWTON A. JOHNSON, DAVID EWING, W. HERBERT GATES, W. M. JOHNSON, S. J. GALLAGHER, O. D. LOFTUS, THOMAS BARRETT, Sr., H. E. AYERS, JAMES P. SWEENEY, CHALK ROBERTS, ROBERT RENDALL, MILO L. ROWELL, H. T. FAUST, JAMES WARD, J. L. D. WALP, FRED E. WINDSOR, M. J. COREY, J. W. WARNER, CLAUD BARNES, W. H. FRASER, ASH SERVICE, SAMUEL MARSHBACK, W. W. W. ICKLINE, J. M. ROBERTSON, P. C. TAYLOR, HENRY GREENLEAF, R. M. COOK, I. W. ALEXANDER, J. W. SWARTZLANDER, HENRY BARADA and E. M. SCOTT (a Voluntary Unincorporated Association),

Complainants,
vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation), (THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA (a Corporation), and THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA (a Corporation), and THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO (a Corporation), Consolidated), [151] and HOMER S. KING, as Trustee, THE CSNTRAL TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE KERN TRADING AND OIL COMPANY (a Corporation), JULIUS KRUTTSCHNITT, J. H. WALLACE, J. L. WILLCUTT, W. A. WORTHINGTON, E. E. CALVIN, EDWARD T. DUMBLE, GEORGE L. KING, C. H. REDINGTON, W. R. SCOTT, J. E. FOULDS, J. A. JONES, WILLIAM F. HERRIN, I. W. HELLMAN, JAMES WILSON, E. K. AINSWORTH, WILLIAM HOOD, A. K. VAN DEVENTER, JOSEPH HELLEN, and WILLIAM MAHL,

Defendants.

Affecting Southern Pacific Railroad Company's Land Grant of July 27th, 1866, and June 28th, 1870.

To the Judges of the Circuit Court of the United States of America, in and for the Southern Dis-

trict of California, Northern Division, Ninth Circuit, in Chancery Sitting:

George D. Roberts, of Coalinga, California, and a citizen of the State of California, and Z. L. Phelps, of Coalinga, California, and a citizen of the State of California, and James Maynard, Jr., of San Francisco, California, and a citizen of the State of California, and A. M. Anderson, of Coalinga, California, and a citizen of the State of California, and T. S. Minot, of San Francisco, California, and a citizen of the State of California, and Newton A. Johnson, of Coalinga, California, and a citizen of the State of California, and David Ewing, of Fresno, California, and a citizen of the State of California, and W. Herbert Gates, of Coalinga, California, and citizen of the State of California, and W. M. Johnson, of Coalinga, California, and [152] a citizen of the State of California, and S. J. Gallagher, of Coalinga, California, and a citizen of the State of California, and O. D. Loftus, of Coalinga, California, and a citizen of the State of California, and Thomas Barrett, Sr., of San Luis Obispo, California, and a citizen of the State of California, and H. E. Ayers, of Grangeville, California, and a citizen of the State of California, and James P. Sweeney, of San Francisco, California, and a citizen of the State of California, and Chalk Roberts, of Los Angeles, California, and a citizen of the State of California, and Robert Rendall, of Los Angeles, California, and a citizen of the State of California, and Milo L. Rowell, of Fresno, California, and a citizen of the State of California, and H. T. Faust, of Los Angeles, Cali-

fornia, and a citizen of the State of California, and James Ward of Coalinga, California, and a citizen of the State of California, and J. L. D. Walp, of Coalinga, California, and a citizen of the State of California, and Fred E. Windsor, of Warren, Pennsylvania, and a citizen of the State of Pennsylvania, and M. J. Corey, of Coalinga, California, and a citizen of the State of California, and J. W. Warner, of Coalinga, California, and a citizen of the State of California, and Claud Barnes, of Coalinga, California, and a citizen of the State of California, and W. H. Fraser, of Oilfields, California, and a citizen of the State of California, and Ash Service, of Coalinga, California, and a citizen of the State of California, and Samuel Marshback, of San Francisco, California, and a citizen of the State of California, W. W. Wickline, of Coalinga, California, and a citizen of the State of California, J. M. Robertson, of Coalinga, California, and a citizen of the State of California, P. C. Taylor, of Fresno, California, and a citizen of the State of California, Henry Greenleaf, of Coalinga, California, and a citizen of the State of California, and R. M. Cook, of Coalinga, California, and a citizen of [153] the State of California, and I. W. Alexander, of Coalinga, California, and a citizen of the State of California, and J. W. Swartzlander, of Coalinga, California, and a citizen of the State of California, and Henry Barada, of Coalinga, California, and a citizen of the State of California, and E. M. Scott, or Coalinga, California, and a citizen of the State of California, a voluntary unincorporated association, bring this their amended

bill in the nature of a supplemental bill by leave of Court first had and obtained against:

The Southern Pacific Company, a corporation of Kentucky, and a citizen of the State of Kentucky,

(The Southern Pacific Railroad Company, a corporation of California, and a citizen of the State of California, and

The Southern Pacific Railroad Company, a corporation of Arizona, and a citizen of the Territory of Arizona, and

The Southern Pacific Railroad Company, a corporation of the Territory of New Mexico, and a citizen of the Territory of New Mexico, Consolidated).

Homer S. King, of San Francisco, California, and a citizen of the State of California, and

The Central Trust Company of New York City, New York, and a citizen of the State of New York, and

The Equitable Trust Company of New York City, New York, and a citizen of the State of New York, and

The Kern Trading and Oil Company of San Francisco, California, and a citizen and denizen of the State of California,

And thereupon your orators complain and say unto your Honors:

I.

That the defendant, the Southern Pacific Company, is a *quasi* public corporation, duly organized and existing under and by virtue of the laws of the State of Kentucky, with its head [154] office and principal place of business at 120 Broadway, New

York City, State of New York.

That the Southern Pacific Railroad Company of California is a *quasi* public Corporation, and was duly organized and now exists under and by virtue of the laws of the State of California, for the purpose of constructing, operating and maintaining a certain standard gauge steam railroad within the State of California between certain points within the borders of the said State, and it has its head office and principal place of business in the Flood Building, in the City and County of San Francisco, State of California.

That the Southern Pacific Railroad Company, of Arizona, is a *quasi* public corporation, duly organized and existing under and by virtue of the laws of Arizona, and was consolidated with the defendant, the Southern Pacific Railroad Company of California on or about the 10th day of March, 1902, together with the Southern Pacific Railroad of New Mexico.

That the Southern Pacific Railroad Company of New Mexico is a *quasi* public corporation, duly organized, and existing under and by virtue of the laws of New Mexico, and was consolidated with the defendant, the Southern Pacific Railroad company of California, on or about the 10th day of March, 1902, together with the Southern Pacific Railroad Company of Arizona as aforesaid.

That said three consolidated corporations are wholly owned, dominated, and absolutely controlled by defendant, the Southern Pacific Company of Kentucky, for that, and this, that said defendant, the Southern Pacific company of Kentucky is a "hold-

ing" Corporation and owns all of the capital stock of each of said defendants to wit: The Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of New Mexico, and the Southern Pacific Railroad Company of Arizona. And [155] your orators are informed and believe has or claims to have some interest by lease or otherwise in all the lands affected by this suit.

That D. O. Mills has died since the commencement of this suit, and prior to filing this supplemental bill, and defendant, Homer S. King, is now sole trustee, in and under a certain Trust Deed, made and executed by defendant, the Southern Pacific Railroad Company of California, on the 1st day of April, 1875, purporting to secure the payment of \$46,000,000, in bonds, to be issued by the said Southern Pacific Railroad Company of California, and claimed by defendants, the Southern Pacific Railroad Company of California, and Homer S. King, to be a lien upon a certain grant of land made by the United States of America to defendant, the Southern Pacific Railroad Company on the 27th day of July, 1877, and is more particularly hereinafter set forth and states, including the lands involved in this suit.

That defendant, the Central Trust Company of New York, State of New York, a private corporation, is sole trustee in and under a certain deed of trust made and executed by the defendant, the Southern Pacific Railroad Company of California, on the 15th day of September, 1894, purporting to secure the payment of \$58,000,000 in bonds issued and to be issued by the said Southern Pacific Railroad Com-

pany, defendant, herein, also in a certain supplemental Trust Deed, between the same parties, limiting said issue of bonds to \$30,000,000 and claimed by defendants, the Southern Pacific Railroad Company of California, and The Central Trust Company of New York, to be a lien upon a certain grant of lands, made by the United States of America to defendant, the Southern Pacific Railroad company on the 27th day of July, 1866, as is more particularly hereinafter set forth and states, including the lands involved in this suit.

That defendant, the Equitable trust Company of New York [156] a private corporation, is sole trustee in and under a certain deed of trust, made and executed by the defendant, the Southern Pacific Railroad Company of California, on the 3d day of January, 1905, purporting to secure the payment of \$88,502,000 in refunding bonds issued and to be issued by the said Southern Pacific Railroad Company defendant herein, and claimed by defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of Arizona, and the Southern Pacific Railroad Company of New Mexico, and defendant the Equitable Trust Company of New York, to be a lien upon the entire assets, properties, franchises and a certain grant of lands made by the United States of America to defendant, The Southern Pacific Railroad Company, on the 27th day of July, 1866, and is more particularly hereinafter set forth and stated, including the lands involved in this suit, and that for and on account of this Trust Deed, your orators say unto

your Honors the defendants, The Southern Pacific Railroad Company of Arizona, and the Southern Pacific Railroad Company of New Mexico are mentioned herein as defendants coupled to and consolidated with defendant, The Southern Pacific Railroad Company of California, as above stated.

That the Kern Trading and Oil Company, for more than five years last past has been, and now is, a corporation, organized and existing under and by virtue of the laws of the State of California, and has its principal office at the City of San Francisco, in said State, and at all times since its organization has been and now is wholly owned, dominated, controlled and operated by the defendant, the Southern Pacific Railroad Company, for the ulterior purpose of doing certain things which, by law, the said the Southern Pacific Railroad Company is prohibited under the law and its charter from doing, viz., mining for petroleum and other minerals, and dealing with the same as a commodity, and [157] claiming, for the benefit of the said Southern Pacific Railroad Company, as an alleged lessee of the said Southern Pacific Railroad Company, the certain prohibited and interdicted mineral lands hereinafter referred to; the said The Kern Trading and Oil Company does the things and makes the illegal claims and demands herein-after set forth against complainants, and the lands herein described, and all of which is to the prejudice of complainants as hereinafter appears and is set forth.

That your orators are informed and believe, and therefore allege the fact to be, and show unto your

Honors that Edwin T. Dumble, George L. King, C. H. Redington, J. E. Foul~~s~~, W. A. Worthington, and W. R. Scott, are officers and directors of the defendant, The Kern Trading and Oil Company, and that Julius Kruttschnitt, J. A. Jones, William F. Herrin, I. W. Hellman, Homer S. King, James K. Wilson, J. L. Willcutt, F. K. Ainsworth, E. E. Calvin, William Hood, A. K. Van Deventer, C. H. Redington, Joseph Hellen and William Mahl are officers and directors of defendants, the Southern Pacific Railroad Company of California, consolidated as aforesaid.

II.

Your orators further say and show unto your Honors that there was heretofore passed by the Congress of the United States of America, and duly approved by the President of the United States of America, on the 27th day of July, 1866, a certain Act, granting certain lands within a certain described radius, to the defendant, The Southern Pacific Railroad Company of California, a corporation, subject, however, to certain mineral reservations, exceptions, exclusions, restrictions and limitations, in said Act contained, and that said Act, granting said lands as aforesaid, thereupon became, and now is, a public law, and that a construction, and an interpretation of sections three, and eighteen of said Acts of Congress is sought in this suit, coupled to [158] all acts and joint resolutions amendatory thereof and supplementary thereto, and all acts of the Department of the Interior of the United States of America, hereinafter set forth and also the patent, herein-

after set forth, made, executed, and delivered by the United States of America to defendant, the Southern Pacific Railroad Company of California, on the 10th day of July, 1894, covering and embracing all lands involved in this suit.

And your orators further say and show unto your Honors, that section three of said Act of July 27th, 1866, is in words, and figures as follows, to wit:

“Section 3, AND BE IT FURTHER ENACTED, that there be and hereby is granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and Telegraphic line to the Pacific Coast, and to secure the safe and speedy transportation of mails, troops, and munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, whenever on the lines thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption of other claims or rights, at the time the line of said railroad is designated by a plat thereof, filed in the office of the Commissioners of the General Land Office; and whenever, prior to said time, any of said sections shall have been granted, sold reserved, occupied by homestead settlers or pre-empted or

otherwise disposed of, other lands shall [159] be selected by said Company in lieu thereof, under the directions of the Secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of the said alternate sections, and not including the reserved numbers; provided further, that the Railroad Company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company' or may consolidate, confederate, and associate with said Company upon the terms named in the first and seventeenth sections of said Act; Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this Act, in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And Provided Further, that the word 'mineral' when it occurs in this Act, shall not be held to include iron and coal: And Provided further, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific Railroad."

And your orators further say that Section eighteen of said Act is in words and figures as follows, to wit:

"Section 18. And be it further enacted that the Southern Pacific Railroad Company, a Company incorporated under the laws of the State of California, is hereby authorized to connect with said Atlantic and Pacific Railroad, formed under this Act, at such points, near the boundary line of the State

of California, as they shall deem most suitable for the railroad lines to San Francisco, and shall have uniform gauge and rate of freight and fare with said road: and in consideration thereof to aid in its construction, shall have similar grants of land, subject to all the conditions [160] and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

That thereafter and by virtue of a joint resolution of Congress approved June 28th, 1870, certain mandatory conditions were imposed and prescribed, by and under which, said railroad and telegraph line should be constructed, and under and by what terms and conditions patents should be issued by the Secretary of the Interior, to defendant, Th^t Southern Pacific Railroad Company of California, for said granted lands, and said joint Resolution was and is in words and figures as follows, to wit:

“BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED: That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said Company in the Department of Interior on the third day of January, eighteen hyndred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the Company to the

Secretary of the Interior, he shall direct an examination of each such section by Commissioners to be appointed by the President, as provided in the Act, making a grant of said Company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the Commissioners to the Secretary of the Interior that such section of said railroad and telegraphic line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said Company for the sections of land *coterninus* to each constructed section reported on as aforesaid, to the extent and amount granted to said Company by the said Act of July twenty-seventh, [161] eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said Act.

“Approved June 28th, 1870.”

III.

Your orators further aver and show unto your Honors, that said defendants, The Southern Pacific Railroad Company of California, preparatory to, and for the purpose of, and with the intent to obtain a patent to the lands involved in this suit, and other lands, did, on or about the 9th day of May, 1892, make the following appointment and certificate, pursuant to, and under and by virtue of the Acts of Congress of July 27th, 1866, July 25th, 1868, and Joint Resolution of June 28th, 1870, which said appointment and certificate was, and is, in words and figures as follows, to wit:

“Office of the Southern Pacific Railroad Company,
San Francisco, California.

“I, Joseph L. Willcutt, Secretary of the Southern Pacific Railroad Company, do hereby certify that Jerome Madden was appointed Land Agent of the Southern Pacific Railroad Company by the Board of Directors of said Company, at a meeting held by the Board of Directors of said Company, at a meeting held on the (10th) tenth day of May A. D. 1875, and that since that time he has been continuously, and now, is, the Land Agent of the Southern Pacific Railroad Company.

“IN WITNESS WHEREOF I have hereunto set my hand and affixed the Corporate Seal of the Southern Pacific Railroad Company on the 9th day of May, A. D. 1892.

[Seal]

“JOSEPH L. WILLCUTT.”

That thereafter, and pursuant to said Acts of Congress and in accordance therewith, and with actual knowledge, absolute acceptance [162] thereof, complete acquiescence therein, and in due recognition of the same, said Jerome Madden did, for and on behalf of defendant, The Southern Pacific Railroad Company, make, under and pursuant to the rules and regulations prescribed by the Commissioner of the General Land Office of the United States of America, and he did file a certain list of Sections of lands known, and designated herein and therein as list No. 24 of lands claimed by the Southern Pacific Railroad Company under said grant, which said list of selections include all the lands involved in this suit, and that said selections did and

does bear the following heading, statement, or claim, concerning and referring to said lands, and is duly signed by said Jerome Madden, on behalf of said defendant, and is, in words and figures, as follows, to wit:

“LIST OF LANDS

in the

VISALIA LAND DISTRICT, CALIFORNIA,
Selected by the
SOUTHERN PACIFIC RAILROAD COMPANY
OF CALIFORNIA.

“The undersigned, the duly authorized Land Agent of the Southern Pacific Railroad Company, of California, and under and by virtue of the Act of Congress, approved July 27th, 1866, entitled, ‘An Act granting lands to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast,’ and the further Act approved July 25th, 1868, entitled ‘An Act to extend the time for the construction of the Southern Pacific Railroad in the State of California,’ and the Joint Resolutions of Congress, June 28th, 1870, ‘Concerning the Southern Pacific Railroad of California,’ and under and in pursuance of the rules and regulations prescribed by the Commissioners of the General Land Office, hereby [163] makes and files the following lists of Selections of public lands claimed by the said company as inuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Acts of Congress, and the location of the line of route of the Railroad and Tele-

graph of said Company; being in part for ninth (9th) and seventeenth (17th) sections, (forty 559/1000 miles) of the same, commencing at a point in NE. $\frac{1}{4}$, Sec. 2, T. 19 S., R. 20 E., M. D. B. & M., and ending at *Alcade* which *sai* sections of road and telegraphic have been duly accepted by the President of the United States *if* America, as provided in the aforesaid Acts and Joint Resolutions of Congress, the Selection being particularly described as follows:.....

“JEROME MADDEN,
“Land Agent of the Southern Pacific Railroad Com-
pany.”

That your orators have not inserted said list in detail in this bill of complaint, at any time, for the reason that it would unnecessarily encumber the record, and subserve no pertinent purposes, and therefore is wholly omitted, but the lands immediately affected by this suit are hereinafter fully described and designated as being, and they are a part of the lands included in said list of Selections.

That thereafter, and on or about May 16th, 1894, The Department of the Interior of the United States of America took action on the foregoing *ex parte* statements, and a new list of said lands was made by said Department of the Interior, which said list was and is known and designated in said Department as “LIST NUMBER 19 SOUTHERN PACIFIC RAILROAD LANDS, MAIN LINE, GRANTED LIMITS, LOS ANGELES, INDEPENDENCE, SAN FRANCISCO AND VISALIA DISTRICTS, CALIFORNIA.” And that said list is a duplicate of

list numbered 34, filed by defendant, The Southern Pacific Railroad Company, and hereinbefore referred to in this bill [164] of complaint, and said list so prepared and numbered 19 bears and contains the following findings of facts, to wit:

“DEPARTMENT OF THE INTERIOR.

“General Land Office.

“May 16th, 1894.

“Whereas by the Act of Congress approved July 27th, 1866, and *and* Joint Resolution of June 23, 1870, to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast, and to secure to the Government the use of the same for postal, military and other purposes; authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a Railroad and Telegraph line, under certain conditions and stipulations expressed in said Act, from the City of San Francisco, to a point of connection with the Atlantic and Pacific Railroad, near the boundary line of said State, and provision is made for the granting to the said Company every alternate section of public land designated by odd numbers to the amount of twenty alternate sections per mile on each side of said Railroad, on the line thereof, and within the limits of twenty miles on each side of said road not sold, reserved, or otherwise disposed of by the United States and to which pre-emption of homestead claim may not have attached at the time the line of said road is definitely fixed.

"And whereas, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the said Act of July 27th, 1866, have reported to him, that the line of said railroad and telegraph, from San Jose to Tres Pinos, and from *Alcade* to *Majare*, together comprising two hundred and fifty-two miles, and four hundred and seventy-nine thousandths of a mile, has been [165] constructed and equipped in the manner prescribed by said Act of July A 27, 1866, and accepted by the President,—

"And whereas, the following tracts have been duly listed under the Act aforesaid, by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of sections, approved by the local officers and on file in this office,—

"And whereas, the said tracts of land lie coterminous to the constructed line of said road and are particularly described as follows, to wit:"

That your orators again omit any detailed list of said lands, for the reasons hereinbefore set forth and stated, and submit to your Honors that it would be unnecessary to insert such list and that such matters would be impertinent.

Your orators further show and aver, that thereafter, for the purpose of carrying said land to patent, and on or before the 16th day of May, 1894, the following certificates were made by the General Land Office of the United States of America, through its

examiners and approved by its Chief of Division in the following words and figures, to wit:

“General Land Office,

“Railroad Division.

“May 16th, 1894.

“We hereby certify that the foregoing list has been carefully examined in connection with the records and plats of this office and the tracts therein described are found to be vacant and unappropriated and within the primary limits of the grant of July 27th, 1866, to the Southern Pacific Railroad Company (Main Line), and subject to approval and patent to said Railroad Company under said Act.

“M. B. HARVEY,

“M. NIVEN,

Examiners.

“Approved, Chief of Division.” [166]

“General Land Office,

“Division of Swamp Lands,

“Washington, D. C., June 23, 1894.

“This certifies that the foregoing list No. 19, Southern Pacific Railroad, aggregating 440,900.85 acres has been carefully examined in connection with the swamp land records of this office, and that the same has been found free from conflict.

“C. T. PIERCE,

“Examiner.

“Approved: EDMOND MALLET,

“Chief of Division.”

Your orators further aver and show unto your Honors, that based upon and acting upon the foregoing *ex parte* statements, the following final order

or decree was made and entered in the Department of the Interior of the United States of America, by its duly authorized officials, to wit: The Commissioner of the General Land Office and the Secretary of the Interior and said order, decree or judgment was and is in words and figures as follows, to wit:

“Now therefore, as it has been found on a careful examination of the foregoing list in connection with the authenticated map on file in the *Central Land Office*, of the Survey of the *Southern Pacific Railroad route*, that the lands fall within the twenty mile lateral limits of said route, and that the said lands so far as the records of the *Central Land Office* show are free from conflict, it is hereby recommended that the tracts described covering four hundred and forty thousand nine hundred acres and twenty-five hundredths of an acre be approved and carried into patent as the lands falling within the grant by the Act aforesaid to the *Southern Pacific Railroad Company of California*, excluding however from the approval and from the transfer in the patent that may issue, ‘All Mineral Lands,’ [167] should any such be found in the tracts aforesaid, but this exclusion according to the terms of the statute shall not be construed to include iron and coal.

“G. W. LAMOREUX, Commissioner.”

“To the Honorable, Secretary of the Interior,
“Department of the Interior,
“Washington, D. C.

“June 27, 1894.

“Approved: Covering four hundred and forty thousand, nine hundred acres and eighty-five hundredths of an acre.

“HOKE SMITH, Secretary.”

IV.

Your orators further say and show unto your Honors, that the patent to the lands involved in this suit, which are embraced within the limits of said Land Grant aforesaid, follows said Joint Resolution and Act of July 27, 1866, and the pertinent and essential part thereof is in words and figures as follows, to wit:

“TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING:

“WHEREAS, by the Act of Congress approved July 27, 1866, and the Joint Resolutions of June 28, 1870, to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast, and to secure to the Government the use of the same for Postal, Military and other purposes, authority is given to the Southern Pacific Railroad Company of California, a Corporation existing under the laws of the State to construct a Railroad and Telegraph line, under certain conditions and stipulations expressed in said Act, from the City of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said State, and [168]

provision is made for granting to the said Company every alternate section of public land designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of the said road 'not sold, reserved or otherwise disposed of by the United States, and to which pre-emption, or homestead claim may have not attached at the time the line of the said road is definitely fixed.

"*And whereas*, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the said Act of July 27th, 1866, have reported to him that the line of the said railroad and telegraph from San Jose to Tres Pinos, and from Alcade to Mojave, together comprising two hundred and fifty-two and four hundred and twenty-nine thousandths of a mile has been constructed and fully completed and equipped in the manner prescribed by said Act of July 27th, 1866, and accepted by the President.

"*And whereas*, the following tracts have been duly listed under the Act aforesaid by the duly authorized land agent of the Southern Pacific Railroad Company, as shown by his original list or selections approved by the local officers and on file in this office.

"*And whereas*, the said tract of land lies co-terminus to the constructed line of the said road are particularly described as follows, to wit: South of

the base line and east of Mount Diablo Meridian,
State of California.

“All of sections 5, 7, 11, 17, 19, 29, 31.

“Township 20, Range 15.

“All of sections 15, 25.

“Township 23, Range 17. [169]

“All of section 31.

“Gownship 23, Range 18.

“Township 21, Range 15.

“All of section 5, and

“All of section 7. (With other lands contained in
said patent not affected by this suit.)

“The said tracts described in the foregoing make
the aggregate area of 440,900.85.

“NOW KNOW YE, That the United States of America in consideration of the premises and pursuant to the Acts of Congress, have given and granted by these presents *to give and to grant unto* the Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing.

“Yet excluding and excepting ‘All Mineral Lands’ should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute, *and shall not be construed to include ‘coal and iron lands.’*

“To have and to hold the same with the appurte-
nances unto the said Southern pacific company and
to its successors and assigns forever:

“In testimony whereof, I, Grover cleveland,
President of the United States have caused these

letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

“Given unto my hand at the City of Washington, this tenth day of July, in the year of our Lord One Thousand eight hundred and ninety-four, and in the Independence of the United States, the one hundred and nineteenth.

“By the President, GROVER CLEVELAND,
“H. M. KEAN, Secretary.”

V.

Your orators further show to your Honors, that prior to the [170] making and delivery of the aforesaid patent to the defendant the Southern Pacific Railroad Company, no investigation or examination of the lands described therein, had been made on behalf of the Government by the Commissioner of the General Land Office, the Secretary of the Interior, or by any other officer, Agent or employee of the Government for the purpose of ascertaining the character of said lands or as to whether or not they were mineralized, and no decree or judgment was ever made or entered in relation to their character, and the lands here in question were, at the time of the issue of said patent, known mineral lands, and it was for this reason that there was inserted in said patent the following clause, reservation, exclusion and exception, to wit: “Yet excluding and excepting all mineral lands, should any such be found in the tracts aforesaid.”

VI.

Your orators further say and show unto your Honors, that defendant, the Southern Pacific Rail-

road Company, did by virtue of its aforesaid acts, set forth in paragraph III of this bill, assent to all the terms and conditions of said Act of Congress, approved July 28th, 1866, and Joint Resolutions of June 28th, 1870, and did wholly submit to the terms and conditions of said Acts and did agree that said Southern Pacific Railroad and its assigns, its successors, and all persons in privity with it, would recognize, respect, abide by, be bound by, be absolutely held by the reservations, exception and exclusion of all mineral lands contained in said grant, *should any such be found*, according to the tenor, conditions, restrictions, terms and limitations and reservations thereof, and contained in said grant and said Joint Resolution, and that said defendant, the Southern Pacific Railroad Company of California, did thereupon, and then and there recognizing said Acts of Congress, apply to the Secretary of the Interior of the United States of America for a certain [171] patent, which is hereinbefore set forth, and which said patent covers and embraces all lands involved in this suit, and that said application, so made, was based upon said Act of Congress and Joint Resolution and the whole thereof; and the order or decree of the Department of the Interior, and that pursuant to said application and under said order, said patent was issued to defendant, the Southern Pacific Railroad Company of California, on the 10th day of July, 1894, and said defendant knowingly received, and accepted said patent, and the whole thereof, in all its parts, from the United States of America, and the United States of

America have never directly or indirectly, by itself, or others, waived or repudiated the same, nor any of the terms, exceptions, reservations, or exclusions therein contained, and said patent so received and accepted by said defendant contained, and does contain'd the following clinging, continuing, exclusion and nondefensible reservation, exception, and restriction, based upon said Act of Congress, and said Joint Resolution of June 30th, 1870, and the final decree of the Department of the Interior, and said reesrvation was, and is in words as follows, to wit:

"YET EXCLUDING AND EXCEPTING ALL MINERAL LANDS SHOULD ANY SUCH BE FOUND IN THE TRACTS AFORESAID, BUT THIS EXCLUSION AND EXCEPTION ACCORDING TO THE TERMS OF THE STATUTE, SHALL NOT BE CONSTRUED TO INCLUDE COAL AND IRON LANDS."

And your orators further say and show unto your Honors, and do hereby insist and submit, that the defendant, the Southern Pacific Railroad Company of California, and all persons in privity with it, and each and all defendants herein, are bound by the aforesaid acts of defendant, the Southern Pacific Railroad Company, and are estopped in equity and good conscience to claim any interest, estate or title, of any nature whatsoever, in or to any of said lands involved in this suit, by virtue of said acts [172] hereinbefore or hereinafter set forth and stated.

VII.

V.

And your orators further say and show unto your

Honors, that the said Act of Congress granting said lands to defendant, The Southern Pacific Railroad Company of California, and all Acts and Joint Resolutions supplementary thereto, or amendatory thereof, and the Acts of the Department of the Interior, of the United States of America, in issuing said patent to the lands involved in this suit, and the recording of said patent, were and are public acts, and should be taken as, and termed public acts in all courts and places whatsoever, as by said acts, intended, and to which your orators beg leave to refer.

VIII.

Your orators further say and show unto your Honors, that defendant, Homer S. King, as Trustee, of the first deed of trust, hereinbefore referred to, placed upon said granted lands, as aforesaid, by defendant, the Southern Pacific Railroad Company of California, and made, executed, and delivered, by said defendant, on or before the first day of April, 1875, by virtue thereof, claims to have some estate, title or interest in and to all the lands involved in this suit, adverse to your orators, but your orators insist and submit, that on account of the matters and things in this bill stated, that each, all or any claim made by said defendant under said trust deed or otherwise are invalid, illegal, and wholly and utterly void, and of no effect against your orators, and that said defendants have no rights, interest or estate in any part thereof, for that said deed was made and accepted with amfull knowledge of said Act of Congress and Joint Resolution.

And your orators further say and show unto your Honors, that defendant, the Central Trust Company of New York, a corporation, [173] as trustee of the second trust deed, hereinbefore referred to, and placed upon said granted lands involved in this suit, as aforesaid, by defendant, the Southern Pacific Railroad Company, and made, executed, and delivered, by said defendant, on or about the first day of September, 1893, by virtue thereof, claim to have some estate, right, *title* or interest in and to all the land involved in this suit, adverse to your orators, but your orators insist and submit that on account of the matters and things in this bill stated, that each, all, or any claims made by said defendant under said trust deed, or otherwise are invalid, illegal and wholly and utterly void and of no effect, and that said defendant has no rights, interests or estate in or to any of the lands involved in this suit, as against your orators, or any part thereof; for that said deed was made and accepted with a full knowledge of said Act of Congress and Joint Resolution.

And your orators further say and show unto your Honors, that defendant, The Equitable Trust Company of New York, a corporation, as trustee of the third trust deed hereinbefore referred to, as aforesaid, and placed upon said granted lands by defendant, the Southern Pacific Railroad Company, and made, executed and delivered, by said defendant on or about the 3d day of January, 1905, by virtue thereof claim to have some interest, estate, right or title in and to all the lands involved in this suit, adverse to your orators, but your orators in-

sist and submit that on account of the matters and things in this bill stated, that each, all or any claims made by said defendant under said trust deed, or otherwise are invalid, illegal and wholly void and of no effect, and that said defendant has no rights, interest or estate in or to any of the lands involved in this suit as against your orators, or any part thereof, for that said deed was made and accepted with full knowledge of said Act of [174] Congress and Joint Resolution.

And your orators further say and show unto your Hnoors, that defendant, the Kern Trading and Oil Company, is a suppositious corporation, and exists in form only, and is composed of and officered by, and absolutely dominated, owned and managed and controlled by certain dummies, employees, officers, and directors of its confederate, the Southern Pacific Railroad Company, a corporation, defendant herein, and was organized by the officers and agents of said defendant, The Southern Pacific Railroad Company, with the fraudulent intent, and for the unlawful purpose of doing certain things indirectly, which defendant its confederate, the Southern Pacific Railroad Company, a corporation could not do directly; that is to say, to sink, develop, operate, and monopolize oil wells, and by such actions to monopolize and hold unto itself all mineral oil lands within the borders or outlines of its said grant, in the State of California, contrary to said Act of Congress and said Joint Resolution, and that pursuant to that fraudulent intent, and to carry out said surreptitious and deceitful scheme, confederating to

gether with said defendant, the Southern Pacific Railroad Company, a corporation, has, at divers times, since the incorporation of defendant, its confederate, and conduit, the Kern Trading and Oil Company, which was incorporated on or about the 21st day of May, 1903, secretly made and entered into, certain leases of certain lands, to this defendant, the Kern Trading and Oil Company, and the defendant, the Southern Pacific Railroad Company, conspiring and confederating together with the Kern Trading and Oil Company, and with defendants Edwin T. Dumble, George L. King, J. B. Foulds, W. A. Worthington, W. R. Scott, and C. H. Redington, direvtors, dummies and officers of said defendant, and further confederating with each other, and the defendant, the Southern Pacific [175] Company of Kentucky, and with defendants, I. W. Hellman, H. A. Jones, William F. Herrin, Homer S. King, James K. Wilson, J. L. Willcutt, F. K. Ainsworth, E. E. Calvin, William Hood, A. K. Vandeventer, Joseph Hellman and William Hood, direvtors, and officers and stockholders of defendant, the Southern Pacific Railroad Company have for the purpose of circumventing the laws, obliquely evading its effects, and creating and maintaining a monopoly as aforesaid, made, executed and delivered many secret leases from itself to itself through the medium of defendant, the Kern Trading and Oil Company, using it as a fraudulent vehicle, conduit or *g-between* to carry out said fraudulent conspiracy. That said leases are not recorded in any public places of the State

of California, but are clandestinely held and secreted by the defendant, The Southern Pacific Railroad Company, and your orators do not know, and are unable to find out, or ascertain just what covenants and conditions said leases contain, when they were executed, or when they expire, or what lands are claimed to be affected by said fraudulent leases, so secretly and surreptitiously executed and delivered, to said surreptitious corporation, defendant, the Kern Trading and Oil Company, but your orators say, based upon the foregoing facts and information and believe that defendant, the Kern Trading and Oil Company *claim* to have some estate, right, title or interest in and to all of the property involved and claimed in this suit by your orators by virtue of said clandestine leases, adverse to your orators, but by virtue of and on account of the matters and things in this bill stated, all claims or any claims made by said suppositious and fraudulent corporation, the Kern Trading and Oil Company, defendant, affecting any of the lands involved herein or claimed by your orators in this suit, under said fraudulent leases or otherwise are invalid, illegal and wholly void and of no effect and said defendant has neither rights, interests, or estate [176] in or to any of the lands involved in this suit, or any part thereof, as against your orators.

And your orators further say, and show unto your Honors, that all of the lands hereinafter described and claimed by your orators are vacant, unimproved, uninclosed, and wild lands, and each quarter section thereof is "proved" land and contains mineral oil

and other kindred minerals in large and paying quantities, and that said lands are more valuable for mining purposes than any other, and said defendants have never at any time, gone into or taken possession of any of the lands involved in this suit.

And your orators further aver and show unto your Honors that, prior to the making of the locations hereinafter mentioned, the said locators actually discovered valuable deposits of petroleum and mineral oils, upon each and every one hundred and sixty acres of land involved in this suit and in large and paying quantities on each and every claim herein, and that said petroleum and mineral oil did then and does now actually exist therein and is in large and paying quantities in each and every quarter section and claim. That the lands immediately adjoining, abutting and contiguous to the tracts involved in this suit, and upon all sides of each of said claims, was and is "proved" mineral and oil land, in which petroleum in large and paying quantities has been and now is found, and which contains shale, seepage of oil, and veins of sand-rock, which said veins, oil, and shale did, and now does extend upon, through, underneath and completely across each and all of the said mining claims set forth and described in this suit. That all of the claims hereinbefore described are wholly within the areas of lands previously withdrawn from any but mineral land entry by the Department of the Interior of the United States of America, and each and all of said lands, and the surrounding lands, contiguous thereto have [177] been, and are now classified by the United States of

America through the Department of the Interior as being, and they are exclusively and notoriously mineral oil lands, and have been publicly known to be such since 1892. That on the 10th day of July, 1894, upon which date said patent was issued to, and accepted by the said defendant, the Southern Pacific Railroad Company, as aforesaid, it then and long prior to, well knew, and its officers well knew and had actual knowledge at said time, of the existence of mineral and petroleum in paying quantities in all the lands involved in this suit, and now claimed by your orator and said defendant well knew at the time said patent was issued and accepted by it, and long prior thereto, that said lands involved in this suit and every quarter section thereof contained mineral oils, and other kindred minerals, and that said lands at all times were, and now are more valuable for mining purposes, and the mineral oils therein, than for agricultural purposes, or any other purpose.

Your orators further insist and submit that defendant, the Southern Pacific Railroad Company, does refuse to permit any of the lands involved in this suit to be exploited, developed or improved in any way, manner, shape or form, and the Southern Pacific Company of Kentucky, is conspiring, and confederating with the Southern Pacific Railroad Company of California and the Kern Trading and Oil Company and all of their officers, directors, agents, representatives, and other defendants herein, to withhold said lands from exploitation, and development against the well-defined common rights of your orators and the citizens of the United States of America

to locate and develop said lands, under said exclusion, exception and reservation, in said acts of Congress, and patent contained, and the mining laws of the United States of America, and your orators further insist and submit that neither the defendant, the Southern Pacific Company, the [178] Southern Pacific Railroad Company, nor the Kern Trading and Oil Company, nor their associates, confederates, directors, agents, representatives, officers, co-conspirators, or others connected with them, have any right or authority to withhold said lands from development and exploitation by your orators, or to retard the progress and growth of the community wherein said lands are situated.

IX.

And your orators further show unto your Honors, that your orators and certain grantors herein named did, in Fresno and Kings County, State of California, on the 19th day of June, 1909, and at divers other times, as is more particularly herein set forth and stated, duly take possession of, and did locate, and duly claim, under the mining laws of the United States of America, in good faith, the following described placer mining claims within the limits of said grant which said claims were located as follows, and said notices of location were, and are, together with the endorsements thereon, in words and figures as follows, to wit:

“LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claimed, under the

Mining Laws of the United States the following described Placed Claim, bounded and described as follows:

Commencing at the northwest corner of Section 5, Township 21 south, Range 15 east, M. D. B. & M., and running south 40 chains, thence east 40 chains; thence north 40 chains; thence west 40 chains to point of beginning, this being the northwest quarter of Section 5, Township 21, south, Range 15, east M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Alphaltum and kindred substances contained [179] therein, also water for domestic and mining purposes, and uses. This claim shall be known as the New View Mining Claim. Is situated in Fresno County, State of California. Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

T. S. MINOT.

Z. L. PHELPS.

JAMES MAYNARD, Jr.

A. M. ANDERSON.

GEORGE D. ROBERTS.

NEWTON A. JOHNSON.

DAVE EWING.

D. M. SPEED.

S. J. GALLAGHER,

Witness to posting.

[Endorsed]: Files for record at the request of D. S. Ewing, June the 21st, 1909, at 17 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining

Claim, pg. 80, Fresno County Record. R. N. Barstow, County Recorder."

8960.

d“LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the southwest corner of Section 7, Township 21 south, Range 15 east, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to point of beginning, this being the southeast quarter of Section 7, Township 21 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, alphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Zeb Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this 21st day of June, 1909.

R. M. COOK.

Z. L. PHELPS.

T. S. MINOT.

NEWTON A. JOHNSON.

I. W. ALEXANDER.

GUY H. SALISBURY.

JAS. MAYNARD, Jr.

D. M. SPEED. [180]

R. M. COOK,

Witness to posting.

[Endorsed]: Filed for record at the request of Everts & Ewing, June 21, A. D. 1909, at 6 min. past 11 o'clock AM. M., and recorded in volume 15 of Mining Claims, pg. 108, Fresno County Records. R. N. Barstow, County Recorder. By W. H. Bates, Deputy Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day and claim under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows: Commencing at the northwest corner of Section 11, Township 20 South, Range 15 East, M. D. B. & M., and running South 40 chains, thence west 40 chains, thence north 40 chains, thence east 40 chains to the point of beginning, this being the northeast quarter of Section 11, Township 20 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, alphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Eleven Mining Claim. Is situate in Fresno County, State of California, located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

T. J. TURNER.

E. M. SCOTT.

D. M. SPEED.

M. E. COOK.

M. J. COREY.

P. W. CYPHER.

GEO. W. WARNER.

CLAUD BARNES.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June the 21st, A. D. 1909, at 25 min. past 8 o'clock A. M. and recorded [181] in Vol. 15 of Mining Claims, pg. 81, Fresno County Records. R. N. Barstow, County Recorder."

8968.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the northwest corner of Section 31, Township 20 south, Range 15 east, M. D. & M., and running south 40 chains, thence East 40 chains, thence north 40 chains, thence west 40 chains, to point of beginning, this being the northwest quarter of Section 31, Township 20 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the James Oil Mining Claim. Is situated in Fresno County, State of California. Located and a copy of this notice posted

on the ground, this 19th day of June, 1909.

CHARLES JAMES.

CHALK ROBERTS.

ROBERT RENDALL.

HENRY C. KERR.

GEO. EAGLE.

JAMES WARD.

A. M. ANDERSON.

J. L. D. WALP.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 3 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 65, Fresno County Records. R. N. Barstow, County Recorder."

8946. [182]

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the northwest corner of Section 29, Township 20 South, Range 15 East, M. D. B. & M., and running east 40 chains, thence south 40 chains, thence west 40 chains, thence north 40 chains to point of beginning, this being the northwest quarter of Section 29, Township 20 south, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Alphaltum and kindred sub-

stances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Swartzlander Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this 19th day of June, 1909.

J. W. SWARTZLANDER.

N. M. SALISBURY.

HENRY BARADA.

S. J. GALLAGHER.

E. N. AYRES.

GEORGE D. ROBERTS.

O. D. LOFTUS.

W. W. AYRES.

Witness:

W. M. JOHNSON.

[Endorsed]: Filed for the record at the request of D. S. Ewing June 21st, A. D. 1909, at 5 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 63, Fresno County Records. R. N. Barstow, County Recorder."

8948.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim under the Mining Laws of the United States, the following described Placer Claim, bounded and described as [183] follows: Commencing at the southeast corner of Section 29, Township 20 South, Range 15 East, M. D. B. & M., and running North 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to point of beginning, this being the South-

east Quarter of Section 29, Township 20 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, A Asphaltum and kindred substances contained therein, also water for domestic and Mining purposes and uses. This claim shall be known as the Tommy Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this 19th day of June, 1909.

T. J. TURNER.

E. M. SCOTT.

M. E. COOK.

M. J. COREY.

P. W. CYPHER.

GEO. W. WARNER.

CLAUD BARNES.

W. H. FRASER.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 1 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 67, Fresno County Records. R. N. Barstow, County Recorder."

8944.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the southeast corner of Section 11, Township 20 South, Range 15 East, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains, to point of beginning, this being the southeast quarter of Section 11, Township 20 south, Range 15 east, M. D. [184] B. & M., and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be *know* as the Fraser Clan Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

W. H. FRASER,
DAVE ISHLMAN,
ASH SERVICE,
FRANK PROVOST,
SAM MARSHBACK,
H. R. CORZIER,
J. H. ROBERTSON,
P. C. TAYLOR,

Locators.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 24 min. past 8 o'clock A. M., and recorded Vol. 15 of Mining Claims, pg. 73, Fresno County Records. R. N. Barstow, County Recorder."

"LOCATION NOTICE."

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the northwest corner of Section 11, Township 20 South, Range 15 East, M. D. B. & M., and running south 40 chains, thence north 40 chains, thence west 40 chains, to point of beginning, this being the northwest quarter of Section 11, Township 20 south, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres, or less.

Claim all Petroleum, Asphaltum, and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Greenleaf Mining Claim. Is situate in Fresno County, State of California. Located [185] and a copy of this notice posted on the ground, this the 19th day of June, 1909.

HARRY GREENLEAF,
DAVE EWING,
N. M. SALISBURY,
J. W. SWARTZLANDER,
HENRY BARADA,
E. N. AYRES,
W. M. JOHNSON,
GEORGE D. ROBERTS,

Locators.

Witness to Posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 23 min. past 8 o'clock A. M., and recorded in Vol. 15, pg. 90, Fresno County Records. R. N. Barstow, County Recorder."

8966.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claims, bounded and described as follows: Commencing at the southwest corner of Section 5, Township 20 South, Range 15 East, M. D. B. & M., and running north 40 chains, thence East 40 chains, thence south 40 chains, thence west 40 chains, to point of beginning, this being the southwest quarter of Section 5, Township 20, South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Southern Five Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 19th day of June, 1909.

CHARLES JAMES.

CHALK ROBERTS.

ROBERT RENDALL.

HENRY C. KERR.

GEORGE EAGLE.

JAMES WARD.

A. M. ANDERSON.

J. L. D. WALP.

Witness to posting,

S. J. GALLAGHER. [186]

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, 1909, at 18 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 82, Fresno County Records. R. N. Barstow, County Recorder."

8961.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the un-
signed have this day located and claim, under the
Mining Laws of the United States the following de-
scribed Placer Claim bounded and described as fol-
lows: Commencing at the northeast corner of Section
5, Township 20 South, Range 15 East, M. D. B. & M.,
and running south 40 chains, thence west 40 chains,
thence north 40 chains, thence east 40 chains to point
of beginning, this being the northeast quarter of Sec-
tion 5, Township 20 South, Range 15 east, M. D.
B. & M., and containing one hundred and sixty acres
or less.

Claim all petroleum, asphaltum and kindred sub-
stances contained therein, also water for domestic
and mining purposes and uses.

This claim shall be known as the Five Oil Mining
Claim. Is situate in Fresno County, State of Califor-
nia. Located and a copy of this notice posted on the

ground, this the 19th day of June, 1909.

J. M. ROBERTSON,
P. C. TAYLOR,
H. R. CROZIER,
JAMES WARD,
T. J. TURNER,
E. M. SCOTT,
M. J. COREY,
P. W. CYPHER,

Locators.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 21 min. past 8 o'clock A. M., and recorded in Volume 114 of Mining Claims, pg. 392, Fresno County Records. R. N. Barstow, County Recorder."

8964. [187]

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the southeast corner of Section 5, Township 20 South, Range 15 East, M. D. B. & M., and running north 20 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to point of beginning, this being the Southeast Quarter of Section 5, Township 20 South, Range 15, East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances, contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the George W. Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

GEORGE W. WARNER.

CLAUD BARNES.

D. M. SPEED.

DAVE ISLAM.

J. W. SWARTZLANDER.

HENRY BARADA.

E. N. AYRES.

N. M. SALISBURY.

Witness *the* posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, 1909, A. D., at 20 min. past 8 o'clock, A. M., and recorded in Vol. 14 of Mining Claims, pg. 403, Fresno County Records. R. N. Barstow, County Recorder."

8963.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and *clai*, under the Mining Laws of the United States, [188] the following described Placer Claim, bounded and described as follows: Commencing at the southwest corner of Section 29, Township 20 south, Range 15 east, M. D. B. & M., and running north 40 chains, thence east 40

chains, thence south 40 chaine, thence west 40 chains to a point of beginning, this being the southwest quarter of Section 29, Township 20 south, range 15 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Bacon Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

JNO. W. BOURDETTE,
WALTER BACON,
H. E. AYERS,
E. N. AYERS,
CHALK ROBERTS,
ROBERT RENDALL,
HENRY C. KERR,
J. L. D. WALP,

Locators.

Witness,

W. M. JOHNSON.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 6 min. past 8 o'clock, A. M., and recorded in Vol. 15 of the Mining Claims, pg. 74, Fresno County Records. R. N. Barstow, County Recorder."

8949.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the

Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the northeast corner of Section 31, Township 20 South, Range 15 East, M. D. B. & M., and running West 40 chains, thence south 40 chains, thence east 40 chains, thence [189] north 40 chains to the point of beginning, this being the northeast quarter of Section 31, Township 20 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Johnson Oil Mining Claim. Is situate in Fresno County, State of California. Locates and a copy of this notice posted on the ground, this the 19th day of June, 1909.

WM. JOHNSON.

S. J. GALLAGHER.

GEORGE D. ROBERTS.

O. D. LOFTUS.

W. W. AYERS.

JOHN W. BOURDETTE.

WALTER BACON.

H. E. AYERS.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 2 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining

Claims, pg. 66, Fresno County Records. R. N. Barstow, County Recorder.”
8945.

“LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows: Commencing at the southwest corner of Section 5, Township 21 South, Range 15 East, M. D. B. & M., and running north 40 chains, thence 40 chains East, thence South 40 chains, thence west 40 chains to point of beginning, this being the southwest quarter of Section 5, Township 21 South, Range 15 East, M. D. B. & M., containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances [190] contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the New West Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground this 19th day of June, 1909.

WALTER BACON.

H. E. AYERS.

ROBERT RENDALL.

HENRY C. KERR.

Z. L. PHELPS.

T. S. MINOT.

N. M. SALISBURY.

J. L. D. WALP.

S. J. GALLAGHER,

Witness to posting.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, 1909, at 16 min. past 8 o'clock A. M., and recorded in Vol. 15 of Mining Claims, pg. 72, Fresno County Records. R. N. Barstow, County Recorder."

8959.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: Commencing at the northwest corner of Section 5, Township 20 South, Range 15 East, M. D. B. & M., and running south 40 chains, thence east 40 chains, thence north 40 chains, thence west 40 chains to point of beginning, this being the boundary of the northwest quarter of Section 5, Township 20 south, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Big Five Mining Claim. Is situated in Fresno County, State of California. Located and [191] a copy of this notice posted on the ground this 19th day of June, 1909.

W. M. JOHNSON,
S. J. GALLAGHER,
GEORGE D. ROBERTS,
O. D. LOFTUS,
W. W. AYERS,
JNO. W. BOURDETTE,
WALTER BACON,
H. E. AYERS,

Locators.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing, June 21st, A. D. 1909, at 19 min. past 8 o'clock, A. M., and recorded in Vol. 14, pg. 381, Fresno County Records. R. N. Barstow, County Recorder."

8962.

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned citizens of the United States in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Ground, viz.:

Commencing at the southwest corner of Section 17, Township 20 south, Range 15 East, W. D. B. & M., thence north 40 chains, thence at right angles east 40 chains, thence at right angles South 40 chains, thence at right angles West 40 chains, to place of beginning and containing according to U. S. Surveyor, 160 acres.

The above claim is located by the undersigned loca-

tors as an association of eight persons and containing eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and kindred minerals and all minerals found therein or thereon, and water for domestic, mining and other purposes, and a copy of this notice was duly posted on said claim on the 19th day of June, 1909. And said claim is *being* the Southwest quarter, situated in the Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Eagle Oil Placer Mining [192] Claim. Located the 19th day of June, 1909.

GEORGE EAGLE.

JAMES WARD.

J. L. D. WALP.

E. M. SCOTT.

E. N. aYERS,

A. M. JOHNSON.

T. J. TURNER.

M. E. COOKE.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant's Mining District, County. Dated 190..... Recorded at the request of D. S. Ewing June 21st, A. D. 1909, at 11 min. past 8 o'clock A. M. Vol. 14 of Mining Claims, at page 379 et seq., Fresno County Records. R. N. Barstow, Recorder."

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned, Citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Mining ground, viz.: Commencing at the Southeast Corner of Section 19, Township 20 South, Range 15 East, M. D. B. & M., thence North 40 chains, thence at right angles West 40 chains, *thence at right angles West 40 chains*, thence at right Angles South 40 chains, thence at right angles East 40 chains to the place of beginning, and containing to U. S. Survey 160 acres.

The above claim is located by the undersigned locators as an association of eight persons and contains eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and all kindred minerals and all minerals found therein or thereon, and water for domestic mining and other purposes, and the copy of this notice was duly posted on said claim, on the 19th day of June, 1909, and said claim *is— being* the Southeast quarter situate in the Coalinga Mining District, County of Fresno, State of California. This claim shall be known as the Tom Oil Placer Mining Claim. Located 19th day of June, 1909. [193]

T. J. TURNER.

M. E. COOK.

P. J. CYPHER.

CLAUD BARNES.

E. M. SCOTT.

M. J. COREY.

GEORGE W. WARNER.

W. H. FRASER.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location Claimant. Recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 13 min. past 8 o'clock A. M., in Vol. 14 of Mining Claims, page 390 et seq., Fresno County Records. R. N. Barstow, County Recorder."

8956.

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Mining Ground, viz.: Commencing at the Northeast Corner of Section 19, Township 20, South, Range 15 East, M. D. B. & M., thence running west 40 chains, thence at right angles South 40 chains, thence at right angles 40 chains East, thence at right angles North 40 chains to place of beginning and containing according to U. S. Surveys 160 acres, being the Northwest Quarter.

The above claim is located by the undersigned locators as an association of eight persons and containing eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and all kindred minerals and all minerals found therein or thereon, and water for domestic, mining and other purposes, and a copy of this notice

was duly posted on said claim on the 19th day of June, 1909, and the said claim is situate in Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Old Oil Olacer Mining Claim located day of June, 1909. [194]

CHARLES JAMES.
CHALK ROBERTS.
HENRY C. KERR.
JAMES WARD.
O. D. LOFTUS.
ROBERT RENDALL.
GEO. EAGLE.
J. L. D. WALP.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location, Claimant
Mining District, County. Dated 19
Recorded at the request of D. S. Ewing, June 21st,
A. D. 1909, at 14 min. past 8 o'clock A. M., in Vol. 14
of Mining Claims, page 382 et seq., Fresno County
Records. R. N. Barstow, Recorder."

8957.

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Placer Mining Ground, viz.: Commencing at the Northeast Corner of Section 17, Township 20, South, Range 15 East, M. D. B. & M., thence West

40 chains, thence at right angles South 40 chains, thence at right angles East 40 chains, thence at right angles North 40 chains to the place of beginning, containing according to U. S. Surveys, 160 acres.

The above claim is located by the undersigned locators as an association of eight persons and containing eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and kindred minerals, and all minerals therein or thereon and water for domestic mining and other purposes, and a copy of this notice *was duly posted on* said Claim on the 19th day of June, 1909.

Being in the Northeast quarter, situate in the Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Ishlman Oil Placer Mining [195] Claim, located 19th day of June, 1909.

DAVE ISHLMAN.

FRANK PROVOST.

H. R. CROZIER.

P. C. TAYLOR.

ASH SERVICE.

SAM MARSHBACK.

J. M. ROBERTSON.

HARRY GREENLEAF.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location, Claimant,
Mining District, County Dated,
19 Recorded at the request of D. S. Ewing,

June 21st, A. D. 1909, at 9 min. past 8 o'clock A. m.
in Vol. 15 of Mining Claims, at page 75 et seq.,
Fresno County Records. R. N. Barstow, Recorder." 8952.

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described Mining Ground, viz.:

Commencing at the Northeast Corner of Section 29, Township 20 South, Range 15 East, M. D. B. & M., being the Northeast quarter. Thence West 40 chains, thence at right angles South 40 chains, thence at right angles East 40 chains, thence at right angles North 40 chains, to the place of beginning and containing according to U. S. Surveys 160 acres.

The above claim is located by the undersigned locators as an association of eight persons and contains eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and kindred minerals, and all minerals found therein or thereon, and water for domestic, mining and other purposes, and a copy of this notice was posted on said claim on the 19th day of June, 1909, and said claim is situate in the Coalinga Mining District, County of Fresno, State of California.

[196]

This claim shall be known as the Corey Oil Placer Mining Claim. Located 19th day of June, 1909.

M. J. COREY.
E. N. AYERS.

GEO. W. WARNER.

W. H FRASER.

M. E. COOK.

P. W. CYPHER.

CLAUD BARNES.

DAVE ISHLMAN.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant Mining District, County. Dated, 190. Recorded at the request of D. S. Ewing June 21st, A. D. 1909, at 7 min. past 8 o'clock A. M. in Vol. 15 of Mining Claims, pg. 84, Fresno County Records. R. N. Barstow, Recorder."

8950.

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned citizens of the United States in compliance with the requirements of the Revised Statutes of the United States, have this day located *the* following described Placer Mining Ground, viz.: Commencing at the Northwest Corner of Section 17, Township 20 South, Range 15 East, M. D. B. & M., thence South 40 chains, thence east at right angles 40 chains, thence at right angles North 40 chains, thence at right angles West 40 chains to the place of beginning and containing, according to the U. S. Survey 160 acres, being the Northwest quarter.

The above claim is located by the undersigned locators as an association of eight persons, and contains eight Placer Claims, said claim is located for the

purpose of holding and developing all Petroleum, Asphaltum and kindred minerals and all minerals found therein or thereon, and water for domestic mining and other purposes, and a copy of this notice was duly posted on said claim, on the 19th day of June, 1909, and said claim is situate in the Coalinga Mining District, County of Fresno, State of California. [197]

This claim shall be known as the Ayers Oil Placer Mining Claim, located 19th day of June, 1909.

W. W. AYERS.

WALTER BACON.

CHARLES JAMES.

ROBERT RENDALL.

JNO. W. BOURDETTE.

H. E. AYERS.

CHALK ROBERTS.

HARRY C. KERR.

Witness *the* posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant Mining District, County. Dated 190. . . . Recorded at the request of D. S. Ewing, June 21st, A. D. 1909, at 12 min past 8 o'clock A. m., in Vol. 14 Mining Claims, page 402, Fresno County Records. R. N. Barstow, Recorder."

8955.

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned Citizens of the Unites States in compliance with the requirements of the Revised Statutes of the

United States, have this day located the following described Placer Mining Ground, viz.:

Commencing at the Southwest corner of Section 7, Township 20, South, Range 15 East, M. D. B. & M., being the Southeast Quarter thence North 40 chains, thence at right angles East 40 chains, thence at right angles South 40 chains, thence at right angles West 40 chains to place of beginning and containing according to U. S. Survey 160 acres.

The above claim is located by the undersigned locators as an association of eight persons, and contains eight Placer Claims. Said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and other kindred minerals and all minerals found therein or thereon, and water for domestic, mining and other purposes, and a copy of this notice was posted on said *clai*, on the 19th day of June, 1909, and said [198] claim is situate in the Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Bourdette Oil Placer Mining Claim, located 19th day of June, 1909.

JNO. W. BOURDETTE.

WALTER BACON.

E. N. AYERS.

ASH SERVICE.

W. W. AYERS.

N. E. AYERS.

A. M. ANDERSON.

FRANK PROVOST.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant
Mining District, County Dated
190 Recorded at the request of D. S. Ewing,
June 21st, A. D. 1909, at 8 min. past 8 o'clock A. M.
in Vol. 15, of Mining Claims, at page 77 et seq.,
Fresno County Records. R. N. Barstow, Recorder." 8951.

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned citizens of the United States, in compliance with the requirements of the Revised Statutes of the United States have this day located the following described Placer Mining Grounds, Viz.:

Commencing at the Southeast corner of Section 17, Township 20 South, Range 15 East, M. D. B. & M., thence North 40 chains, thence at right angles West 40 chains, thence at right angles south 40 chains, thence at right angles East 40 chains to the place of beginning and containing according to the U. S. Survey 160 acres.

The above claim is located by the undersigned locators as an association of eight persons, and contains eight Placer Claims, said claim is located for the purpose of holding and developing all Petroleum, Asphaltum and all kindred minerals, and all minerals found therein or thereon, and water for domestic, mining [199] and other purposes, and a copy of this notice was duly posted on said claim, on the 19th day of June, 1909, and said claim being the Southeast quarter situate in the Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Ewing Oil Placer Mining Claim. Located 19th day of Jjne, 1909.

DAVE EWING.

J. W. SWARTZLANDER.

W. M. JOHNSON.

GEO. D. ROBERTS.

N. M. SALISBURY.

HENRY BARADA.

S. J. GALLAGHER.

O. D. LOFTUS.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location. Claimant.....
Mining District.....County. Dated..... 19.....
Recorded at the request of D. S. Ewing, June 21st,
A. D. 1909, at 10 min. past 8 o'clock A. M. in Vol.
15 of Mining Claims, page 85, Fresno County Rec-
ords. R. N. Barstow, Recorder."

8953.

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the under-signed citizens of the Unites States, in compliance with the Revised Statutes of the Unites States, have this day located the following described Placer Min-ing Ground, viz.:

Commencing at the quarter section corner in the west line of Section 19, Township no. 20, South of Range 15, East, M. D. B. & M., Fresno County, California, thence south 20 chains, thence at right angles east 40 chains, thence at right angles north 40 chains, thence at right angles west 40 chains, to the

place of beginning, containing 80 acres as per U. S. Survey.

The above claim is located by the undersigned locators as an association of eight persons, and contains eight Placer claims. Said claim is located for the purpose of holding and [200] developing all Petroleum, Asphaltum and all kindred minerals and other minerals found therein or thereon, and water for domestic, mining and other purposes, and a copy of this notice was duly posted on said claim on the 19th day of June, 1909. Being the north half of the Southwest quarter situate in the Coalinga Mining District, County of Fresno, State of California. This claim to be known as the New Oil Placer Mining Claim. Located 19th day of June, 1909.

W. M. JOHNSON.

A. M. ANDERSON.

S. J. GALLAGHER.

GEO. D. ROBERTS.

Witness to posting,

W. M. JOHNSON.

[Endorsed]: Notice of Location.....ClaimantMining District. County..... Dated..... 190..... Recorded at request of D. S. Ewing June 21st, A. D. 1909, at 15 min. past 8 o'clock A. M. in Vol. 15 of Mining Claims at page 91 et seq., Fresno County Records. R. N. Barstow, Recorder." 8958.

“LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following

described Placer Claim, bounded and described as follows: Commencing at the Quarter Corner in east line of Section 7, Township 21 South, Range 15 East, M. D. B. & M., and running north 20 chains, thence west 80 chains, thence south 20 chains, thence east 80 chains, to point of beginning, this being the south half of Section 7, Township 21 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. [201]

This claim shall be known as the Seven Oil Mining Claim. Is situate in Fresno County, State of California. Located and a copy of this notice posted on the ground, this the 21st day of June, 1909.

Z. L. PHELPS,
A. M. ANDERSON,
E. M. SCOTT,
M. J. COREY,
R. M. COOKE,
T. S. MINOT,
WATER BACON,
W. W. AYERS,

Locators.

R. M. COOKE,

Witness to posting.

[Endorsed]: Filed for record at the request of Everts & Ewing June 21st, A. D. 1909, at 5 min. past 8 o'clock A. M., and recorded in Vol. 15, of Mining Claims, pg. 107, Fresno County Records. R. N.

Barstow, County Recorder. By W. H. Bates, Deputy Recorder."

8994.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claims, bounded and described as follows:

Commencing at the Southwest corner of Section 11, Township 20 South, Range 15 East, M. D. B. & M., and running North 40 chains, thence East 40 chains, thence south 40 chains, thence west 40 chains to point of beginning, this being the Southwest quarter of Section 11, Township 20 South, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Greater Mining Claim. Is situate in Fresno County, State of California.

Located and a copy of this notice posted on the ground [202] this 19th day of June, 1909.

S. J. GALLAGHER,

D. M. SPEED,

O. D. LOFTUS,

W. W. AYERS,

JNO. W. BOURDETTE,

WALTER BACON,

H. E. AYERS,
CHALK ROBERTS,

Locators.

Witness to posting,

S. J. GALLAGHER.

[Endorsed]: Filed for record at the request of D. S. Ewing June 21st, A. D. 1909, at 22 min. past 8 o'clock A. M., and recorded in Vol. 14 of Mining Claims, pg. 384, Fresno County Records, R. N. BARSTOW, County Recorder."

8965.

"NOTICE OF LOCATION, PLACER CLAIM.

NOTICE IS HEREBY GIVEN, that the undersigned citizens of the United States, in compliance with the Revised Statutes of the United States, have this day located the following described Placer Mining Ground, viz.:

Commencing at the Southwest corner of Section 7, Township 21 South, Range 15 east, M. D. B. & M., and running thence north 40 chains, east 40 chains, south 40 chains, thence west 40 chains, to point of beginning, being Lots no. 3, No. 4, No. 5, No. 6, according to U. S. Surveys, containing 160 acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses, situated in the Coalinga Mining District, County of Fresno, State of California.

This claim shall be known as the Buster Oil Placer Mining Claim. Located 21st day of June, 1909.

T. J. TURNER.

G. W. WARNER.

H. R. CROZIER.
Z. L. PHELPS.
P. W. CYPHER.
W. H. FRASER.
DAVE EWING.
GEO. D. ROBERTS.

Witness to posting,

R. M. COOK. [203]

[Endorsed]: Notice of Location..... Claimant Mining District, County. Dated, 190—. Recorded at the request of Everts & Ewing, June 21st, A. D. 1909, at 7 min. past 11 o'clock, A. M. in Vol. 15 of Mining Claims, at page 96, Fresno County Records. R. N. Barstow, Recorder. By W. H. Bates, Deputy Recorder."

8996.

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the southeast corner of Section 15, Township 23 south, Range 17 East, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to point of beginning, this being the southeast quarter of Section 15, Township 23 South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic

and mining purposes and uses.

This claim shall be known as the Dave Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

DAVE EWING.

GUY H. SALISBURY.

J. W. SWARTZLANDER,
HENRY BARADA.

E. N. AYERS.

W. M. JOHNSON.

S. J. GALLAGHER.

GEO. D. ROBERTS.

Witness to posting,

S. J. GALLAGHER.” [204]

“LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

Commencing at the southeast corner of Section 25, Township 23 South, Range 16 East, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to point of beginning, this being the southeast quarter of Section 25, Township 23 South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic

and mining purposes and uses.

This claim shall be known as the M. J. C. Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

M. J. COREY,
P. W. CYPER,
GEO. W. WARNER,
CLAUD BARNES,
M. H. FRASER,
DAVE ISHLMAN,
ASH SERVICE,
FRANK PROVOST,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 19 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 459, Kings County Records.
Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: [205]

Commencing at the northeast corner of Section 25, Township 23 South, Range 17 East, M. D. B. & M., and running south 40 chains, thence west 40 chains, thence north 40 chains, thence east 40 chains to point

of beginning this being the northeast quarter of Section 25, Township 23 South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Kerr Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

HENRY C. KERR,
GEORGE EAGLE,
JAMES WARD,
A. M. ANDERSON,
J. L. D. WALP,
T. J. TURNER,
E. M. SCOTT,
M. E. COOKE,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 18 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 459, Kings County Records.
Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following

described Placer Claim, bounded and described as follows:

Commencing at the southwest corner of Section 23, Township 23 South, Range 17 East, M. D. B. & M., and running north 40 chains, thence 40 chains east, thence south 40 chains, thence west 40 chains to point of beginning, this being the southwest [206] quarter of Section 23, Township 23, South Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the Loftus Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

O. D. LOFTUS,
W. W. AYERS,
JNO. W. BOURDETTE,
WALTER BACON,
H. E. AYERS,
CHARLES JAMES,
CHALK ROBERTS,
ROBERT RENDALL,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 17 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 458, Kings County Records. Jas. M. Bowman, Recorder."

“LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

Commencing at the northwest corner of Section 23, Township 23 South, Range 16 East, M. D. B. & M., and running south 40 chains, thence East 40 chains, thence north 40 chains, thence west 40 chains to point of beginning, this being the northwest quarter of Section 23, Township 23 South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. [207]

This claim shall be known as the J. W. Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

J. M. SWARTZLANDER,
HENRY BARADA,
E. N. AYERS,
D. M. SPEED,
W. M. JOHNSON,
S. J. GALLAGHER,
O. D. LOFTUS,
GEO. D. ROBERTS,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 16 min. past 8 o'clock A. M. in Vol. 3 of Miscel., page 458, Kings County Records. Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

COMMENCING at the northwest corner of Section 15, Township 23, South, Range 17 West, *W. B. D. & M.*, and running South 40 chains, thence east 40 chains, thence north 40 chains, thence west 40 chains to the point of beginning, this being the northwest quarter of Section 15, Township 23 south, Range 17 East, *M. D. B. & M.*, and containing one hundred and sixty acres or less.

Claim all Petroleum, Asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Roberts Oil Mining [208] Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

GEORGE D. ROBERTS.

O. D. LOFTUS.

W. W. AYERS.

JNO. W. BOURDETTE,
WALTER BACON.

H. E. AYERS.

CHAS. JAMES.

CHALK ROBERTS.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, **June 21st, A. D. 1909**, at 12 min. past 8 o'clock A. M. in Vol. 3 of Miscel., page 456, Kings County Records. Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

COMMENCING at the southeast corner -*f* Section 23, Township 23 South, Range 17 East, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to the point of beginning this being the southeast quarter of Section 23, Township 23 south, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Prevost Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909. Frank Prevost, Sam Marshback, H. R. Crozier, J. M. Robertson, P. C. Taylor, Harry Greenleaf, Dave Ewing, N.

M. Salisbury, Locators.” [209]

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 15 min. past 8 o'clock, in Vol 3 of Miscel., page 457, Kings County Records. Jas. M. Bowman, Recorder.”

“LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

COMMENCING at the southwest corner of Section 25, Township 23 south, Range 17 east, M. D. B. & M., and running north 40 chains, thence east 40 chains, thence south 40 chains, thence west 40 chains, to the point of beginning, this being the southwest quarter of Section 25, Township 23 soutg, Range 17 East, M. D. B. & M. and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Barada Oil Mining claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

HENRY BARADA,

E. W. AYERS,

D. M. SPEED,

W. M. JOHNSON,
S. J. GALLAGHER,
GEORGE D. ROBERTS,
Locators, and
O. D. LOFTUS and
W. W. AYERS,
Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 21 min. past 8 o'clock A. M., in Vol. 3 of Miscel. page 460, Kings County Records. Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this [210] day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

COMMENCING at the northwest corner of Section 25, Township 23 south, Range 17 East, M. D. B. & M., and running south 40 chains, thence east 40 chains, thence north 40 chains, thence west 40 chains to the point of beginning, this being the northwest quarter of Section 25, Township 23 south, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum *ad* kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Uncle Sam Oil Mining Claim. Is situate in Kings County, State of California.

Located, and a copy of this notice posted on the ground this the 19th day of June, 1909.

SAM MARSHBACK,
H. R. CROZIER,
J. H. ROBERTSON,
P. C. TAYLOR,
HARRY GREENLEAF,
DAVE EWING,
GUY SALISBURY and
J. W. SWARTZLANDER,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 20 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 460, Kings County Records. Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States the following described Placer Claim, bounded and described as follows:

COMMENCING at the northeast corner of Section 15, Township 23 south, Range 17 east, M. D. B. & M., and running south 40 chains, thence west 40 chains, thence north 40 chains, thence east 40 chains to the point of beginning this being the northeast [211] quarter of section 15, Township 23 south, range 17 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred sub-

stances contained therein, also water for domestic and mining *purpose* and uses.

This claim shall be known as the Fifteen Oil Mining Claim. Is situate in Kings County, State of California. Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

DAVE ISHLMAN,
ASH SERVICE,
FRANK PREVOST,
SAM MARSHBACK,
H. R. CROZIER,
W. M. JOHNSON,
P. C. TAYLOR,
HARRY GREENLEAF,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 10 min. past 8 o'clock A. M., in Vol. 3, Miscel., page 455, Kings County Records.
Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

COMMENCING at the northeast corner of Section 23, Township 23 South, Range 17 East, M. D. B. & M. and running south 40 chains, thence west 40 chains, thence north 40 chains, thence east 40 chains

to the point of beginning, this being the northeast quarter of Section 23, Township 23, — Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses. This claim shall be known as the Cooke Oil Mining Claim. Is situate in Kings County, State of California. Located and a copy of this notice posted on the ground this 19th [212] day of June, 1909.

M. E. COOKE,
M. J. COREY,
P. W. CYPHER,
GEO. W. WARNER,
CLAUD BARNES,
W. H. FRASER,
DAVE ISHLMAN and
ASH SERVICE,

Locators.

Witness to posting,

S. J. GALLAGHER.

Record at the request of A. M. Anderson, June 21st, A. D. 1909, at 14 min. past 8 o'clock, in Vol. 3 of Miscel., Recorded, page 457, Kings County Records. Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

"NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

COMMENCING at the southeast corner of Section 31, Township 23 South, Range 18 East, M. D. B. & M. and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains, to the point of beginning, this being the southeast quarter of Section 31, Township 2e3 South, Range 18 East, M. D. B. & M. and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining *purpose* and uses. This claim shall be known as the Ward Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

JAMES WARD,
A. M. ANDERSON,
J. L. D. WALP,
T. J. TURNER,
E. M. SCOTT,
M. E. COOKE,
M. J. COREY and
P. W. CYPHER,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909 at 8 min. past 8 o'clock A. M., in Vol. 3 of Miscel., [213] page 454, Kings County Records. Jas. M. Bowman, Recorder."

"LOCATION NOTICE."

"NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

COMMENCING at the southwest corner of Section 31, Township 23 South, Range 18 East, M. D. B. & M., and running north 40 chains, thence east 40 chains, thence south 40 chains, thence west 40 chains to the point of beginning, this being the southwest quarter of Section 31, Township 23 south, Range 18 east M. D. B. & M., and containing one hundred and sixty acres or less.

Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes and uses.

This claim shall be known as the J. M. R. Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

J. M. ROBERTSON,
P. C. TAYLOR,
HARRY GREENLEAF,
DAVE EWING,
N. W. SALISBURY,
J. W. SWARTZLANDER,
HENRY BARADA and
D. M. SPEED,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st A. D. 1909, at 9 min. past 8 o'clock A. M., in Vol. 3 of Miseel., page 454, Kings County Records. Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows: [214]

COMMENCING at the northwest corner of Section 31, Township 23 South, Range 18 East, M. D. B. & M.. and running south 40 chains, thence east 40 chains, thence west 40 chains, thence north 40 chains, to the point of beginning, this being the northwest quarter of section 21, Township 23 South, Range 18 East, M. D. B. & M. and containing one hundred and sixty acres or less. Claim all petroleum, asphaltum *ad* kindred substances contained therein; also water for domestic and mining purposes and uses. This claim *shal* be known as the George W. Mining Claim. Is situate in Kings County State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

GEO. W. WARNER,
CLAUD Barnes,
W. H. FRASER,
DAVE ISHLMAN,
ASH SERVICE,

FRANK PREVOST,
SAME MARSHBACK and
H. R. CROZIER,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 6 min. past 8 o'clock A. M., in Vol. 3 Miscel., Kings County Records. Jas. M. Bowman, Recorder."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

COMMENCING at the northeast corner of Section 31, Township 23 South, Range 18 East, M. D. B. & M., and running South 40 chains, thence west 40 chains thence north 40 chains, thence east 40 chains to the point of beginning, this being the northeast quarter of Section 31 Township 23 South, Range 18 East, M. D. B. & M., and containing one hundred and sixty acres or less. Claim all petroleum, asphaltum and kindred substances contained therein, also water for domestic and mining purposes [215] and uses.

This claim shall be known as the Thirty-One Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the

ground this the 19th day of June, 1909.

JNO. W. BOURDETTE,
WALTER BACON,
H. E. AYERS,
CHAS. JAMES,
CHALK ROBERTS,
ROBERT RENDALL,
HENRY C. KERR,
GEORGE EAGLE,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 7 min. past 8 o'clock A. M., in Vol. 3 of Miscel., page 453, Kings County Records.
Jas. M. Bowman."

"LOCATION NOTICE.

NOTICE IS HEREBY GIVEN, that the undersigned have this day located and claim, under the Mining Laws of the United States, the following described Placer Claim, bounded and described as follows:

COMMENCING at the southwest corner of Section 15, Township 23 South, Range 17 East, M. D. B. & M., and running north 40 chains, thence east 40 chains, thence south 40 chains *then* west 40 chains to the point of beginning, this being the northwest quarter of Section 15, Township 23 South, Range 17 East, M. D. B. & M., and containing one hundred and sixty acres or less. Claim all petroleum, asphaltum and kindred substances contained therein, also

water for domestic purposes and uses. This claim shall be known as the Rendall Oil Mining Claim. Is situate in Kings County, State of California.

Located and a copy of this notice posted on the ground this the 19th day of June, 1909.

ROBERT RENDALL,
HENRY C. KERR,
GEORGE EAGLE,
JAMES WARD,
A. M. ANDERSON,
J. L. D. WALP,
T. J. TURNER, and
E. M. SCOTT,

Locators.

Witness to posting,

S. J. GALLAGHER.

Recorded at the request of A. M. Anderson, June 21st, A. D. 1909, at 13 min. past 8 o'clock A. M., in Vol. 3 of Miscel. [216] page 456, Kings County Records. Jas. M. Bowman, Recorder."

And your orators further say, that said notices of location were duly filed, in the manner prescribed by law, for record, and were duly recorded in the office of the County Recorder of Fresno and Kings Counties, State of California, at the time and on the dates in the endorsements thereon and therein respectively set forth and stated; and that none of said locations nor the records of the same, nor any, or either of them, have ever been relinquished, waived, or cancelled, but now are, and have been, at all times, in full force and effect.

X.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration, and in good faith, Guy H. Salisbury and N. M. Salisbury, and E. M. Cooke, P. W. Cypher and Frank Prevost, the original locators of the hereinafter described placer mining claims, bargained, sold, quitclaimed, transferred and conveyed to Fred E. Windsor, all the rights, title, claim, interest and estate in and to said certain placer mining claims set forth in this bill, known and described as follows, to wit:

The Zeb Mining Oil Claim: Commencing at the southeast corner of Section 7, township 21 south, range 15 east, M. D. B. & M. and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to the point of beginning, and being the southeast quarter of section 7, township 21 south, range 15 east, M. D. B. & M., and containing one hundred and sixty acres or less, and filed for record in Vol. 15 of Mining Claims, page 108 Fresno County Records. No. 8995.

Also the ELEVENTH MINING CLAIM: Commencing at the northeast corner of section 11, township 20 south, range 15 east, M. D. B. & M., and running south 40 chains, thence west 40 chains, [217] thence north 40 chains, thence east 40 chains to the point of beginning. This being the northeast quarter of section 11, township 20 south, range 15 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Also the SWARTZLANDER OIL MINING

CLAIM: Commencing at the northwest corner of section 29, township 20 south, range 15 east, M. D. B. & M., and running east 40 chains, thence south 40 chains, thence west 40 chains, thence north 40 chains to the point of beginning. This being the northwest quarter of Section 29, range 15 east, M. D. B. & M., and containing one hundred *dna* sixty acres or less.

Also the **TOMMY OIL MINING CLAIM:** Commencing at the quarter west line of Section 31, township 20 south, range 15 east, M. D. B. & M., and running south 20 chains, thence east 80 chains; thence north 20 chains, thence west 80 chains to the point of beginning. This being *gh* the north half of the south half of Section 31, township 20 south, range 15 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also the **GREENLEAF MINING CLAIM:** Commencing at the northwest corner of section 11, township 20 south, range 15 East, M. D. B. & M., and running south 40 chains, thence east 40 chains, thence north 40 chains, thence west 40 chains to the point of beginning. This being the northwest quarter of Section 11, township 20 south, Range 15 East, M. D. B. & M., and containing one hundred and sixty acres or less.

Also the **GEORGE W. MINING CLAIM:** Commencing at the southeast corner of Section 5, township 20 south, range 15 east, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to the point of beginning, this being the southeast quarter of section 5, township 20 south, range 15 east, M. D. B. & M.,

and containing one hundred and sixty acres or less.

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Also the *NEW EST MINING CLAIM*: Commencing at the southwest corner of Section 5, township 20 south, range 15 east, M. D. B. & M., and running north 40 chains, thence east 40 chains, thence south 40 chains, thence west 40 chains, to the point of beginning, being the southwest quarter of Section 5, township 20 south, range 15 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Also the *EAGLE OIL PLACER MINING CLAIM*: Commencing at the southwest corner of Section 1, township 20 south, range 15 east, M. D. B. & M., running north 40 chains, thence at right angles east 40 chains, thence at right angles south 40 chains, thence at right angles west 40 chains to place of beginning, containing one hundred and sixty acres or less.

Also the *TOM OIL PLACER MINING CLAIM*: Commencing at the southeast corner, Section 19, Township 20 south, range 15 east, M. D. B. & M., thence north 40 chains, thence at right angles west 40 chains, thence at right angles south 40 chains, thence at right angles east 40 chains to the place of beginning, containing one hundred and sixty acres.

Also the *COREY OIL PLACER MINING CLAIM*: Commencing at the northeast corner of Section 29, township 20 south, range 15 east, M. D. B. & M., being the northeast quarter, thence west 40 chains, thence at right angles south 40 chains, thence at right angles east 40 chains, thence at right angles north 40 chains, to place of beginning, containing one hundred

and sixty acres.

Also the EWING OIL PLACER MINING CLAIM: Commencing at the southeast corner of Section 17, township 20 south, range 15 east, M. D. B. & M., thence *nrthn* 40 chains, thence at right angles west 40 chains, thence at right angles *southe* 40 chains, thence at right angles east 40 chains to the place of beginning, containing one hundred and sixty acres.

Also the DAVE OIL MINING CLAIM: Commencing at the southeast [219] — of Section 15, township 23 south, range 17 east, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains, to place of beginning, being the southeast quarter of Section 15, township 23 south, range 15 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also the KERR OIL MINING CLAIM: Commencing at the northeast corner of Section 25, township 23 south, range 17 east, M. D. B. & M., and running south 40 chains, thence west 40 chains, thence north 40 chains, thence east 40 chains to the point of beginning, being the northeast quarter of Section 25, township 23 south, range 17 east, M. D. B. & M., and containing one hundred and sixty acres or less.

Also PREVOST OIL MINING CLAIM: Commencing at the southeast corner of Section 25, township 23 south, range 17 east, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to the point of beginning, being the southeast quarter of Section 23, township 23 south, range 17 east, M. D. B. & M., con-

atining one hundred and sixty acres or less.

Also the UNCLE SAM OIL MINING CLAIM: Commencing at the northwest corner of Section 25, township 23 south, range 17 east, M. D. B. & M., and running south 40 chains, thence east 40 chains, thence north 40 chains, thence west 40 chains, to the point of beginning, being the northwest quarter of Section 25, township 23 south, range 17 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also the COOKE OIL MINING CLAIM: Commencing at the northeast corner of Section 23, township 23 south, range 17 east, M. D. B. & M., and running south 40 chains, thence east 40 chains, thence north 40 chains, thence west 40 chains, to point of beginning, being the northeast quarter of Section 23, township 23 [220] south, range 17 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also the WARD OIL MINING CLAIM: Commencing at the southeast corner of Section 31, township 23 south, range 13 east, M. D. B. & M., and running north 40 chains, thence west 40 chains, thence south 40 chains, thence east 40 chains to point of beginning, being the southeast quarter of Section 31, township 23 south, range 15 east, M. D. B. & M., and conaining one hundred and sixty acres or less.

Also the J. M. R. OIL MINING CLAIM: Commencing at the southwest corner of Section 31, township 23 south, range 18 east, M. D. B. & M., and running north 40 chains, theence east 40 chains, thence south 40 chains, thence west 40 chains to point of beginning, being the southwest quarter of Section 31,

township 23 south, range 18 east, M. D. B. & M., containing one hundred and sixty acres or less.

Also all the right, title, interest and estate of P. W. Cypher in and to the Five Oil Mining Claim, The Eleven Mining Claim, the Tom Oil Placer Mining Claim, the Corey Oil Placer Mining Claim, the M. J. C. Oil Mining Claim, the Ward Oil Mining Claim, and the Buster Oil Placer Mining Claim, as is in this bill hereinbefore described.

Also all the right, title, interest and estate of Frank Prevost in and to the Bourdette Oil Placer Mining Claim, the Fraser Clan Mining Claim, the Ishlman Oil Placer Mining Claim, the Fifteen Oil Mining Claim, the Prevost Oil Mining Claim, the M. J. C. Oil Mining Claim, the Geo. W. Oil Mining Claim, as is in this bill hereinbefore described.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration, and in good faith, Ed. N. Ayers, John W. Bourdette, Walter Bacon, Dave Ishlman, Chas. James, the original locators [221] of the hereinafter described Placer Mining Claims, bargained, sold, quitclaimed, transferred and conveyed to James P. Sweeney, all the right, title, claim, interest and estte in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

THE GEORGE W. MINING CLAIM, Bourdette Oil Placer Mining Claim, Greenleaf Mining Claim, Eagle Oil Placer Mining Claim, Corey Oil Placer Mining Claim, Swartzlander Oil Mining Claim, Bacon Oil Mining Claim, Dave Oil Mining Claim, J.

W. Oil Mining Claim, Barada Oil Mining Claim, Big Five Mining Claim, Greater Mining Claim, Ayers Oil Placer Mining Claim, Johnson Oil Mining Claim, Roberts Oil Mining Claim, Loftus Oil Mining Claim, Thirty-one Oil Mining Claim, New West Mining Claim, Seven Oil Mining Claim, Fraser Clan Mining Claim, Ishlaman Oil Placer Mining Claim, Fifteen Oil Mining Claim, Cooke Oil Mining Claim, M. J. C. Oil Mining Claim, Southern Five Mining Claim, Old Oil Placer Mining Claim, James Oil Mining Claim, as is in this bill hereinbefore described.

Your orators further state and show unto your Honors, that oprior to the commencement of this suit, for a valuable consideration, and in good faith, W. W. Ayers, the original locator of the hereinafter described placer mining claims, bargained, sold, quit-claimed, transferred and conveyed to Thomas Barrett, Sr., all the right, title, claim, interest and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

The Big Five Mining Claim, Bourdette Placer Mining Claim, Greater Mining Claim, Ayers Placer Mining Claim, Swartzlander Mining Claim, Johnson Oil Mining Claim, Roberts Oil Mining Claim, *Roberts Oil Mining Claim*, Loftus Oil Mining Claim, Barada Oil Mining Claim, Seven Oil Mining Claim.

Your orators further state and show unto your Honors, that [222] prior to the commencement of this suit, for a valuable consideration, and in good faith, H. R. Crozier, the original locator of the hereinafter described placer mining claims, bargained, sold, quitclaimed, transferred and conveyed to W.

W. Wickline, all his right, title, interest, claim and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit: The Five Oil Mining Claim, The Fraser Clan Mining Claim, Ishlman Oil Placer Mining Claim, Prevost Oil Mining Claim, Uncle Sam Oil Mining Claim, Geo. W. Oil Mining Claim, Buster Oil Placer Mining Claim.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration and in good faith, George Eagle, the original locator of the hereinafter described placer mining claims, bargained, sold, quit-claimed, transferred and conveyed to William M. Johnson, all the right, title, claim, interest and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

Southern Five Mining Claim, Eagle Oil Placer Mining Claim, Old Oil Placer Mining Claim, James Oil Mining Claim, Rendall Oil Mining Claim, Kerr Oil Mining Claim, Thirty-one Oil Mining Claim.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration and in good faith, Henry C. Kerr, the original locator of the hereinafter described Placer Mining Claims, bargained, sold, quit-claimed, transferred and conveyed to Milo B. Rowell, all the right, title, claim, interest and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

Southern Five Mining Claim, Ayers Oil Placer Mining Claim, Old Oil Placer Mining Claim, James

Oil Mining Claim, Bacon Oil Mining Claim, Kerr Oil Mining Claim, Rendall Oil Mining Claim, [223] Thirty-one Oil Mining Claim, New West Mining Claim.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration and in good faith, D. M. Speed, the original locator of the hereinafter described placer mining claims, bargained, sold, quit-claimed, transferred and conveyed to W. Herbert Gates, all the right, title, claim, interest and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

George W. Mining Claim, Greater Mining Claim, Eleven Mining Claim, J. W. Oil Mining Claim, Barada Oil Mining Claim, J. M. R. Oil Mining Claim, New View Mining Claim, Zeb Oil Mining Claim.

Your orators further state and show unto your Honors, that prior to the commencement of this suit, for a valuable consideration, and in good faith, T. J. Turner, the original locator of the hereinafter described placer mining claims, bargained, sold, quit-claimed, transferred and conveyed to H. T. Faust, all the right, title, claim, interest and estate in and to certain placer mining claims set forth in this bill, known and described as follows, to wit:

Five Oil Mining Claim, Eleven Mining Claim, Eagle Oil Placer Mining Claim, Tom Oil Placer Mining Claim, Tommy Oil Mining Claim, Rendall Oil Mining Claim.

And your orators further say unto your Honors, that Fred E. Windsor, Thomas Barrett, Sr., James

P. Sweeney, W. W. Wickline, William M. Johnson, Milo L. Powell, W. Herbert Gates, H. T. Faust, are now the true and lawful owners and holders of all the title and estate of said grantors, original locators of said premises and placer mines conveyed as aforesaid.

XI.

And your orators further say unto your Honors, that they [224] are now in actual possession of said lands hereinbefore described, under the mining laws of the United States of America, and your orators further insist and submit that they are entitled to the exclusive use and possession of all of said lands, to do all assessment work thereon, subject, however, to the paramount title of the United States of America therein and thereto up to and until such time as your orators can obtain a patent thereto which they are endeavoring to secure, and that there is ample unsold, unreserved and undisposed of land along said lines of the aforesaid Railroad Company, within the State of California, to which pre-emption of homestead claim has not attached, from which to select an amount equal to the mineral lands in the aforesaid tract incorporated, and particularly the lands herein claimed by your orators.

XII.

Your orators show and aver that defendants, The Southern Pacific Railroad Company and its confederates, and its fraudulent conduit, the Kern Trading and Oil Company, defendant herein, threatens to and will, unless restrained and enjoined, trespass upon the lands involved in this suit, and that said defand-

ants will interfere with the possession of said lands by your orators by force, and violence, and with hired, vicious and desperate men, will prevent your orators from performing the necessary and lawful assessment work upon said lands, or from making further and proper discoverues of minerals of oil thereon.

The defendant, the Kern Trading and Oil Company, did willfully and knowingly, through one of its duly authorized agents, and officers, maliciously publish or did cause to be maliciously published in the "California Oil World," a newspaper of general circulation, published at Bakersfield, Kern County, California, in July 1, 1909, issue thereof the following unlawful, wicked and [225] vicious threat:

"RAILROAD TO PROTECT LANDS.

"Will not Say Whether With Rigs or Guns.

"Bakersfield, June 30.—A high official of the K. T. & O. who declined to *ermit* his name to be used, asserted emphatically to-day that the Southern Pacific would protect all the lands that it owns that have been jumped.

"'You may be fully assured,' said he, 'that if any overt act is undertaken by the jumpers who have filed location notices on all the land of the Company from Sunset through Coalinga, we will protect our property.'

"'How will you protect it?' he was asked. 'With guns or drilling rigs?'

"'We will protect it effectively,' was the reply."

And your orators further show and aver, that

defendant, The Kern Trading and Oil Company, is meant by the letters and sign K. T. & O. Co. in said article, in said newspaper, and defendant, The Kern Trading and Oil Company, did in fact intend it to be understood by those who read such article, and said articles was and is understood by those who read it to mean, and it did and does mean, that defendant, The Kern Trading and Oil Company and its confederates, the Southern Pacific Railroad Company, would and will use deadly weapons to drive your orators off from, and away from the lands located by your orators, and claimed in this suit, thereby preventing your orators from doing their assessment work, as by law required, and obtaining patents. And defendants the Southern Pacific Railroad Company, and its confederates, the Kern Trading and Oil Company, have made divers and sundry other vicious and unlawful threats, to divers persons, to the effect, that they, the said defendants, would take the law in their own hands to protect their so-called pretended, and usurped claims in the lands involved in this suit, by firearms, and [226] deadly weapons, committing murder, if necessary; and your orators aver that unless restrained and enjoined by the process of your Honorable Court said acts will be committed by said defendants and the damages and injuries so threatened will be irreparable, unless it please your Honors, the premises considered, to grant unto your orators an interlocutory injunction pending the determination of this suit.

XIII.

Your orators further aver and show unto your

Honors, that each piece, parcel or tract of land involved in this suit, is over the value of \$2,000.00 exclusive of interest and costs. And your orators in consideration thereof, and forasmuch as your orators are entirely remediless in the premises according to the strict rules of the common law and can only have relief in a court of equity, where matters of this kind are properly cognizable and relievable, and to save a multiplicity of suits and actions at law, and to the end, therefore, that the said defendants may, if they can (answer under oath being specially waived) and according to the best, and utmost of their several belief, fully true, direct and perfect answers make to such of the several interrogatories hereinafter numbered and set forth as by note hereunder written they are respectfully required to answer; that is to say:

1st. Has the Southern Pacific Company a lease upon the roadbed and rolling stock of the Southern Pacific Railroad Company; if so, when does it expire, and what are the terms, covenants and conditions, and does it include in any way, the land grant now held by defendant, the Southern Pacific Railroad Company, under the Act of Congress approved July 27, 1866, and all Acts and Joint Resolutions, amendatory thereof, and supplementary thereto?

2nd. Have you, or either of you, a copy of the agreement consolidating [227] the Southern +acific Railroad Company of California, with the Southern Pacific Railroad Company of Arizoa and New Mexico?

3d. Will you please produce it or a true copy of the original?

4th. If you will not produce it, what is there contained in said agreement that you desire to conceal?

5th. What motive have you in concealing said agreement and why do you refuse to produce it?

6th. Please give the full and true names of all the stockholders in the defendant, the Kern Trading and Oil Company, and state whether or not its stock is held in escrow and by whom and whose safe is in in and why it was put there, and in whose name?

7th. Please give the present occupation of the Directors of the Kern Trading and Oil Company.

8th. How long have they, each, worked for the Southern Pacific Railroad Company?

9th. What salary do they, each, receive from the Southern Pacific Railroad Company?

10th. What salary do they, each, receive from the Kern Trading and Oil Company, as officers, or directors of that corporation?

11th. Please state who are now the trustees of the first mortgage on the land grant of 1866 and 1870 of defendant, the Southern Pacific Railroad Company of California.

12th. Please state who are now the trustees if the second and third mortgage upon the land grant of the Southern Pacific Railroad Company of California.

13th. Please state how many leases the Southern Pacific Company has made to the Kern Trading and Oil Company. [228]

14th. Will you please furnish a copy of said

leases and place the same on file with the papers in this case?

15th. If not, why?

16th. What do you wish to conceal?

17th. Why did *you record* these leases with the respective Recorders of Fresno and Kings Counties, California, in the manner provided by law in the State of California, and according to the custom of business men in all, *communites*, and what *d* you wish to conceal?

18th. Where is the head office and principal place of business of defendant, the Kern Trading and Oil Campanyl is it in the Flood Building, San Francisco, California?

19th. Is it not a fact that the Kern Trading and Oil Company was organixed for the purpose of holding and manipulating all the mineral lands of the Southern Pacific Railroad Company of California?

20th. Why and for what pirpose was it organ-
ized? Please state fully without evasion, reserva-
tion or equivocations or deceit.

21st. Have you any objection to giving the solici-
tor or counsel for complainants permission to exam-
ine the books of the Kern Trading and Oil Company?

22nd. If you have, why?

23rd. What *di* you wish to conceal?

24th. How much money does the Kern Trading and Oil Company turn over monthly or at any other tine to defendant, the Southern Pacific Railroad Company?

25th. How much semi-annually?

26th. How much annually?

27th. When do settlements take place between the Kern Trading and Oil Company, and the Southern Pacific Railroad Company?

28th. Will you furnish a copy of this last statement or settlement between the Kern Trading and Oil Company and the Southern [229] +acific Railroad Company, including copy of statement of all transactions up to that time?

29th. Will you furnish a true copy of all trust deeds given by defendant, the Southern Pacific Railroad Company, and which you claim to be a lien upon the land grant set forth and described in this suit?

30th. Will you give a full, fair and truthful statement of the amount of all bonds outstanding, secured by said trust deeds?

31st. Who are the present officers and directors of the Southern Pacific Railroad Company of New Mexico?

32nd. Who are the present officers and directors of the Southern Pacific Railroad Company of Atizoa?

33rd. Do you know who were the directors and officers of the Southern Pacific Railroad Company during the years 1892, 1893 and 1894, and will you answer and do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? Will you set forth the same fully and at large in your answer?

The defendant, the Southern Pacific Company,

and the Southern Pacific Railroad Company, consolidated, by their officers, are required to answer interrogatorv No. 1, 2, 3, 4, 5, 27, 28, 29, 30, 31, 32, 33.

The defendant, the Kern Trading and Oil Company by its officers, Edwin T. Dumble, George L. King, C. H. Redington, J. E. Foulds, W. A. Worthington, and W. R. Scott, are required to answer interrogatories numbers 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28. The defendants, the Southern Pacific Railroad Company, consolidated as is in this bill more specifically set forth, and the Kern Trading and Oil [230] Company. The defendants W. F. Herrin and E. E. Calvin are required to answer interrogatores numbers 1, 2, 3, 4, 5, 11, 12 and 23, and that all the defendants be required to answer the premises.

1st. WHEREFORE: YOUR ORATORS PRAY:

That an instruction and interpretation be had and made by this Court of sections 3 and 18 of said Act of Congress, approved July 27, 1866, and the mandatory joint resolution of Congress authorizing, instructing and requiring the Secretary of the Interior of the United States to issue patent to thr Southern Pacific Railroad Company of California, and "expressly" prescribing what said patents should, and should not contain, approved June 28th, 1870, and the final order or decree, that patent issue, made by the commissioner of the General Land Office and approved by the Honorable Secretary of the Interior of the United States of America on June 27th, 1894, also the clause in said decree and patent reading as follows:

"Yet excluding and excepting and mineral lands" should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute shall not be construed to include "coal and iron lands" and all of said patent.

2nd. That the title of the complainants *and in* to the lands and premises hereinbefore described, be, by decree or judgment of this court, confirmed, and that the defendants and all persons or corporations claiming under them, be forever foreclosed and barred from having or claiming any title or interest therein or thereto.

3rd. That an interlocutory injunction be issued by this Court against each, any and all of the defendants herein, their servants, agents, attorneys, employees, and all persons in privity with them, and all persons acting under the control, authority or direction [231] of defendants, or either of them, directly or indirectly, requiring each, all and every one of them, to desist from any interference with the property in dispute, claimed herein, until *the* final *de-determination* of this suit, and that at that time, said injunction be permanent.

4th. That defendants, the Southern *Oacific* Railroad Company, a corporation, the Equitable Trust Company of New York, Homer S. King, Central Trust Company of New York, a corporation, the Kern Trading and Oil Company, a corporation, may be required to set forth the nature of their respective claims in or to the property involved in this suit, that all adverse claims of defendants may be determined by a decree of this *suit* and the operating of

the patent herein set forth, be restricted and controlled.

5th. That by said decree it be declared and adjudged that defendants, the Southern Pacific Railroad Company of California, a corporation, Homer S. King, Central Trust Company of New York, a corporation, Equitable Trust Company of New York, The Kern Trading and Oil Company, a corporation, has no estate or interest whatever in or to said lands and premises involved in this suit under said patent or any part or parcel thereof, and that the title of plaintiffs is good and valid, to the property in controversy, subject, however, to the paramount title of the United States of America thereto.

6th. That defendants be forever enjoined and barred from asserting any claim whatever in or to said lands and premises, or the minerals therein, adverse to the interests of your orators *et al.* herein, and for such other and further relief preliminary and final, as to this Court seem most equitable and just, and judgment and decree against defendants herein, the Southern Pacific Railroad Company, a corporation, for their costs and disbursements in this suit.

7th. May it please your Honors to grant unto your orators the writ of subpoena of the United States of America, directed [232] to the Southern Pacific Company, a corporation, the Southern Pacific Railroad Company, a corporation, and the Southern Pacific Railroad Company of Arizona, a corporation, and the Southern Pacific Railroad Company, of New Mexico, a corporation, consolidated; Homer S. King, as Trustee. The Central Trust Company of

New York, State of New York, a corporation; the Equitable Trust Company of New York, a corporation; the Kern Trading and Oil Company, a corporation; Julius Kruttschnitt, J. H. Wallace, J. L. Willcutt, W. A. Worthington, E. E. Calvin, Edwin T. Dumble, George L. King, C. H. Redington, W. R. Scott, J. E. Foulds, J. A. Jones, William Herron, I. W. Hellman, James Wilson, F. K. Ainsworth, William Hood, A. K. Van Deventer, Joseph Hellen, William Mahl, commanding them on a certain day and under a cervain penalty, to be and appear in this court, then and there to answer the premises, and to stand to, and abide by, such order and decree as may be made against them, and your complainants will ever pray.

FRANCIS J. HENEY,
B. D. TOWNSEND, and
A. H. BLATCHLEY,
Solicitors for Complainants.

State of California,
County of San Francisco,
Northern District of California,
United States of America,—ss.

I, James P. Sweeney, being first duly sworn, on *my own* behalf of all the other complainants in the within suit, depose and say: That I am one of the complainants herein; that I have read the foregoing Bill of Complaint and know the contents thereof, and that the same is true of my own knowledge, except as to those matters which are therein stated on information and belief, [233] ans as to those mat-

The Southern Pacific Company et al. 287
ters I believe it to be true.

JAMES P. SWEENEY.

Subscribed and sworn to before me this 29th day
of April, 1911.

[Seal] J. J. KERRIGAN,
Notary Public in and for the City and County of San
Francisco, State of California.

Northern District of California,
United States of America, Ninth Circuit,—ss.

I, A. H. Blatchley, one of the solicitors for com-
plainants, hereby certify that I have compared the
above copy with the original bill and the same is a
true copy of said origina; bill and the whole thereof.

A. H. BLATCHLEY.

[Endorsed]: No. 177—In Equity. United States
Circuit Court, Ninth Judicial Circuit, Southern Dis-
trict of California, Northern Division. George D.
Roberts et al., Complainants, vs. The Southern
Pacific Company, a Corporation, et al., Defendants.
Amended and Supplemental Bill of Complaint.
Service of copy of the within admitted. Apr. 29th,
1911. Wm. Singer, Jr., D. V. Cowden and G. V.
Shoup, Attys. for Defts. Filed April 29th, 1911.
Wm. M. Van Dyke, Clerk. Francis J. Heney, B. D.
Townsend and A. H. Blatchley, Solicitors for Com-
plainats. [234]

In the Circuit Court of the United States of America, in and for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. 177.

GEORGE D. ROBERTS, Z. L. PHELPS, JAMES MAYNARD, Jr., A. M. ANDERSON, T. S. MINOT, NEWTON A. JOHNSON, DAVID EWING, W. HERBERT T. GATES, W. M. JOHNSON, S. J. GALLAGHER, O. D. LOFTUS, THOMAS BARRETT, Sr., H. E. AYERS, JAMES P. SWEENEY, CHALK ROBERTS, ROBERT RENDALL, MILO L. ROWELL, H. T. FAUST, JAMES WARD, J. L. D. WALP, FRED E. WINDSOR, M. J. COREY, J. W. WARNER, CLAUD BARNES, W. H. FRASER, ASH SERVICE, SAMUEL MARSHBACK, W. W. WICKLINE, J. M. ROBERTSON, P. C. TAYLOR, HENRY GREENLEAF, R. M. COOK, I. W. ALEXANDER, J. W. SWARTZLANDER, HENRY BARADA and E. M. SCOTT (a Voluntary Unincorporated Association),
Complainants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation), (THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA (a Corporation), and THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA (a Corporation), and THE SOUTHERN PACIFIC RAILROAD COMPANY OF

NEW MEXICO (a Corporation), Consolidated, and [235] HOMER S. KING, as Trustee), THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE KERN TRADING AND OIL COMPANY (a Corporation), JULIUS KRUTTSCHNITT, J. H. WALLACE, J. L. WILLCUTT, W. A. WORTHINGTON, E. E. CALVIN, EDWARD T. DUMBLE, GEORGE L. KING, C. H. REDINGTON, W. R. SCOTT, J. E. FOULDS, J. A. JONES, WILLIAM F. HERRIN, I. W. HELLMAN, JAMES WILSON, E. K. AINSWORTH, WILLIAM HOOD, A. K. VAN DEVENTER, JOSEPH HELLEN and WILLIAM MAHL,

Defendants.

Petition for Allowance of Appeal.

The above-named complainants, conceiving themselves aggrieved by the decree made and entered by the said Circuit Court, in the above-entitled cause, on March 21, 1911, sustaining the demurrers of the Southern Pacific Railroad Company and the Kern Trading and Oil Company to and dismissing the Amended and Supplemental Bill of Complaint, do hereby appeal from said decision to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, papers

and proceedings upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

FRANCIS J. HENEY,
Solicitor for Complainants. [236]

[Endorsed]: No. 177—In Equity. In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit. George D. Roberts et al., Complainants, vs. The Southern Pacific Railroad Company et al., Defendants. Petition for Allowance of Appeal. Filed Sep. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Francis J. Heney, Solicitor for the Complainants. [237]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division, Ninth Circuit.*

IN EQUITY—No. 177.

GEORGE D. ROBERTS, Z. L. PHELPS, JAMES MAYNARD, Jr., A. M. ANDERSON, T. S. MINOT, NEWTON A. JOHNSON, DAVID EWING, W. HERBERT T. GATES, W. M. JOHNSON, S. J. GALLAGHER, O. D. LOFTUS, THOMAS BARRETT, Sr., H. E. AYERS, JAMES P. SWEENEY, CHALK ROBERTS, ROBERT RENDALL, MILO L. ROWELL, H. T. FAUST, JAMES WARD, J. L. D. WALP, FRED E. WINDSOR, M. J. COREY, J. W. WARNER, CLAUD BARNES, W. H. FRASER, ASH SERVICE, SAMUEL MARSHBACK, W. W. WICK-

LINE, J. M. ROBERTSON, P. C. TAYLOR,
HENRY GREENLEAF, R. M. COOK, I. W.
ALEXANDER, J. W. SWARTZLANDER,
HENRY BARADA and E. M. SCOTT (a
Voluntary Unincorporated Association),
Complainants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation), (THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA (a Corporation), and the SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA (a Corporation), and THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO (a Corporation), Consolidated, and HOMER S. KING, as Trustee),
[238] THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE KERN TRADING AND OIL COMPANY (a Corporation), JULIUS KRUTTSCHNITT, J. H. WALLACE, J. L. WILLCUTT, W. A. WORTHINGTON, E. E. CALVIN, EDWARD T. DUMBLE, GEORGE L. KING, C. H. REDINGTON, W. R. SCOTT, J. E. FOULDS, J. A. JONES, WILLIAM F. HERRIN, I. W. HELLMAN, JAMES WILSON, E. K. AINSWORTH, WILLIAM HOOD, A. K. VAN DEVENTER, JOSEPH HELLEN and WILLIAM MAHL,

Defendants.

Assignment of Errors.

Now come the complainants in the above-entitled cause, by Francis J. Heney, their solicitor, and *ssign* the following errors upon which they will rely on their appeal from the decree heretofore made and entered by this Honorable Court on the 21st day of March, 1911, in the above-entitled cause, to wit:

I.

The Court erred in sustaining defendants' respective demurrs to complainants' amended and supplemental Bill of Complaint and in making and entering a decree dismissing complainants' said amended and supplemental Bill of Complaint.

II.

That the Court erred in holding that said amended and supplemental Bill of Complaint did not state facts sufficient to constitute a cause of suit against the defendants demurring, or matter entitling complainants to the relief sought. [239]

III.

That the Court erred in holding that any cause of action or cause of suit shown or sought to be shown by said amended and supplemental Bill of Complaint is barred by the Act of Congress approved March 2d, 1896, *wntitled* "AN ACT TO PROVIDE FOR THE *EXCEPTION* OF TIME WITHIN WHICH SUITS MAY BE BROUGHT TO VACATE AND ANNUL LAND PATENTS AND FOR OTHER PURPOSES," and printed and published in Volume 29, page 42 et seq., United States at Large, or by Sections 318, 319, 320, 321, and

343 of the Codes of Civil Procedure of the State of California.

IV.

That the Court erred in holding that any cause of action or of suit shown by said amended and supplemental Bill of Complaint, is barred by the long delay and latches of complainants.

V.

That the Court erred in holding that the exception of mineral lands contained in said patent was inserted therein by officers of the Government without authority of law, and that the same was invalid, and without binding force.

VI.

That the Court erred in holding that the said patent issued without any examination as to the quality of the land embraced within it or any determination or adjudication by the United States Land Department that the land was not mineral, was conclusive of the nonmineral quality of the lands described in the aforesaid amended and supplemental Bill of Complaint, and that it was not competent for complainants in this Court to show the mineral character or quality of said lands, and thus avoid said patent.

VII.

That the Court erred in holding that the acceptance by the Southern Pacific Railroad Company of the patent at the time [240] and in the manner set forth in the amended Bill of Complaint did not constitute an estoppel which precluded on its part

the denial of the validity of the mineral exception therein contained.

VIII.

That the Court erred in holding that the Joint Congressional Resolution of June 30, 1870, did not authorize and direct the inclusion in said patent of the exception of mineral lands therein contained.

IX.

That the Court erred in holding that the granting act of July 27, 1866, did not authorize and provide for, under the particular circumstances set forth in the amended Bill of Complaint, the inclusion in said patent of said exception of mineral land.

X.

That the Court erred in holding that there had been before issuance of said patent a determination by the land department of the United States that the land was agricultural and not mineral.

XI.

That the Court erred in holding that the said patent was, on its face, regular and sufficient to convey the legal title of said lands to the said Southern Pacific Railroad Company in absence of any statement of the character or quality of said land or of any adjudication or determination of the character or quality of the land and in face of the statement in the patent that there had not been any determination as to the mineral or nonmineral character or quality of the land embraced in the patent.

FRANCIS J. HENEY,
Solicitor for Complainants.

[Endorsed]: No. 177—In Equity. In the Circuit Court of the United [241] States of America in and for the Southern District of California, Northern Division, Ninth Circuit. George D. Roberts et al., Complainants, vs. The Southern Pacific Company a Corporation, et al., Defendants. Assignment of Errors. Filed Sep. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Francis J. Heney, Solicitor for Complainants. [242]

In the Circuit Court of the United States of America, in and for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. 177.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation), et al.,

Defendants.

Order Allowing Appeal.

On motion of Francis J. Heney, solicitor in this cause, for the above-named complainants, it appearing to the Court that said complainants have filed their Assignment of Errors, IT IS HEREBY ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree in said cause made and entered on the 21st day of March, 1911, be and the same is hereby allowed; and it is further ordered that the bond for

costs, be, and the same is, hereby fixed at the sum of Five Hundred Dollars (\$500).

Dated September 15, 1911.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. 177—In Equity. In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit. George D. Roberts et al., Complainants, vs. Southern Pacific Company et al., Complainants. Order Allowing Appeal. Filed Sep. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Francis J. Heney, Solicitor for Complainants. [243]

(VIGNETTE)

AMERICAN SURETY COMPANY
OF NEW YORK.

Capital and Surplus \$5,500,000.

Company's Office Building,
100 Broadway, New York.

In the Circuit Court of the United States of America, in and for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. 177.

GEORGE D. ROBERTS, Z. L. PHELPS, JAMES MAYNARD, Jr., A. M. ANDERSON, T. S. MINOT, NEWTON A. JOHNSON, DAVID EWING, W. HERBERT T. GATES, W. M. JOHNSON, S. J. GALLAGHER, O. D.

LOFTUS, THOMAS BARRETT, Sr., H. E. AYERS, JAMES P. SWEENEY, CHALK ROBERTS, ROBERT RENDALL, MILO L. ROWELL, H. T. FAUST, JAMES WARD, J. L. D. WALP, FRED E. WINDSOR, M. J. COREY, J. W. WARNER, CLAUD BARNES, W. H. FRASER, ASH SERVICE, SAMUEL MARSHBACK, W. W. WICKLINE, J. M. ROBERTSON, P. C. TAYLOR, HENRY GREENLEAF, R. M. COOK, I. W. ALEXANDER, J. W. SWARTZLANDER, HENRY BARADA and E. M. SCOTT (a Voluntary Unincorporated Association),

Complainants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation), (THE SOUTHERN PACIFIC [244] RAILROAD COMPANY OF CALIFORNIA (a Corporation), and the SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA (a Corporation). and THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO (a Corporation), Consolidated, and HOMER S. KING, as Trustee, THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE KERN TRADING AND OIL COMPANY

(a Corporation), JULIUS KRUTTSCHNITT, J. H. WALLACE, J. L. WILLCUTT, W. A. WORTHINGTON, E. E. CALVIN, EDWARD T. DUMBLE, GEORGE L. KING, C. H. REDINGTON, W. R. SCOTT, J. E. FOULDS, J. A. JONES, WILLIAM F. HERRIN, I. W. HELLMAN, JAMES WILSON, E. K. AINSWORTH, WILLIAM HOOD, A. K. VAN DEVENTER, JOSEPH HELLEN and WILLIAM MAHL,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, George D. Roberts, Z. L. Phelps, James Maynard, Jr., A. M. Anderson, T. S. Minot, Newton A. Johnson, David Ewing, W. Herbert *T.* Gates, W. M. Johnson, S. J. Gallagher, O. D. Loftus, Thomas Barrett, Sr., H. E. Ayers, James P. Sweeny, Chalk Roberts, Robert Rendall, Milo L. Rowell, H. T. Faust, James Ward, J. L. D. Walp, Fred E. Windsor, M. J. Corey, J. W. Warner, Claud Barnes, W. H. Fraser, Ash Service, [245] Samuel Marshback, W. W. Wickline, J. M. Robertson, P. C. Taylor, Henry Greenleaf, R. M. Cook, I. W. Alexander, J. W. Swartzlander, Henry Barada and E. M. Scott, a voluntary unincorporated association, as principals, and the American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and duly authorized to transact business in the State of California, as surety, are held and firmly bound

unto The Southern Pacific Company, a corporation, (The Southern Pacific Railroad Company of California, a corporation, and The Southern Pacific Railroad Company of Arizona, a corporation, and The Southern Pacific Railroad Company of New Mexico, a corporation, consolidated), and Homer S. King, as trustee, The Central Trust Company of New York, State of New York, a corporation, The Equitable Trust Company of New York, State of New York, a corporation, The Kern Trading and Oil Company, a corporation, Julius Kruttschnitt, J. H. Wallace, J. L. Willcutt, W. A. Worthington, E. E. Calvin, Edward T. Dumble, George L. King, C. H. Redington, W. R. Scott, J. E. Foulds, J. A. Jones, William F. Herrin, I. W. Hellman, James Wilson, E. K. Ainsworth, William Hood, A. K. Van Deventer, Joseph Hellen and William Mahl, corporations organized and existing under the laws of the State of California, in the full and just sum of Five Hundred Dollars (\$500.00), lawful money of the United States of America, to be paid to the said defendants, their attorneys, successors, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, successors, executors and administrators, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 15th day of September, A. D. 1911.

WHERE, lately at a session of the Circuit Court of the United States in and for the Southern District of California, [246] Northern Division, in a suit pending in said court between the said com-

plainants and the said defendants, a decree was rendered against the said complainants, and the said complainants having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals, to reverse the decree of the aforesaid suit, and a citation directed to said defendants, is to be issued citing and admonishing them to appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at San Francisco, California.

NOW, the condition of the said obligation is such that if the said complainants shall prosecute their appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation is to be void; otherwise to remain in full force and effect.

AMERICAN SURETY COMPANY OF
NEW YORK.

[Seal]

C. S. VAN BRUNDT,
Resident Vice-President.

Attest: HAROLD M. PARSONS,

Resident Assistant Secretary.

[Endorsed]: No. 177. In the Circuit Court of the United States of America, in and for the Southern Dist. of Calif., Northern Division, Ninth Circuit. Geo. D. Roberts et al. vs. Southern Pacific Co. et al. Appeal Bond. Approved September 15, 1911. Wm. W. Morrow, Circuit Judge. Filed Sep. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. American Surety Com-

pany of New York, Brantley W. Dobbins, Acting Manager for Northern California and Nevada, Clunie Building, San Francisco, California. [247]

In the Circuit Court of the United States of America, in and for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. 177.

GEORGE D. ROBERTS et al.,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation) et al.,

Defendants.

Praecipe for Transcript on Appeal.

To the Clerk of said Court:

Sir: Please issue and send to the United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, transcript on appeal in above suit, made up of the following records: (1) Citation on Appeal; (2) Amended and Supplemental Bill; (3) Subpoena to Southern Pacific Company and Kern Trading and Oil Company, with proof of service; (4) Demurrers to Amended and Supplemental Bill; (5) Order Sustaining Demurrer; (6) Decree; (7) Reasons of Court on Demurrer; (8) Verified Petition of James P. Sweeney for order allowing complainants to plead over, serve and file, "Amended Bill for, as, and instead of," Amended Bill dismissed by decree made and entered March 21, 1911, and affidavits of Francis J. Heney and A. H. Blatchley

thereto; (9) Order to Show Cause Why Said Petition Should not be Granted; (10) Stipulation That Said Petition be Heard before Hon. William W. Morrow, at San Francisco, California; (11) Order Entering Francis J. Heney, B. D. Townsend and A. H. Blatchley on the Records as Solicitors for Complainants; (12) Order Allowing the Filing and Serving of Said Amended Bill; (13) Amended Bill [248] Filed Under Said Order, Made and Filed April 29th, 1911; (15) Petition for Order Allowing Appeal; (16) Assignment of Errors; (17) Order Allowing Appeal; (18) Bond on Appeal; (19) Clerk's Certificate to Transcript.

FRANCIS J. HENEY,
Solicitor for Complainants.

[Endorsed]: No. 177—In Equity. In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit. George D. Roberts et al., Complainants, vs. Southern Pacific Company et al., Defendants. Praeclipe for Transcript on Appeal. Filed Sep. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Francis J. Heney, Solicitor for Complainants. [249]

[Clerk's Certificate to Transcript.]

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Northern Division.

No. 177.

GEORGE D. ROBERTS, Z. L. PHELPS, JAMES MAYNARD, Jr., A. M. ANDERSON, T. S. MINOT, NEWTON A. JOHNSON, DAVID EWING, W. HERBERT T. GATES, W. M. JOHNSON, S. J. GALLAGHER, O. D. LOFTUS, THOMAS BARRETT, Sr., H. E. AYERS, JAMES P. SWEENEY, CHALK ROBERTS, ROBERT RENDALL, MILO L. ROWELL, H. T. FAUST, JAMES WARD, J. L. D. WALP, FRED E. WINDSOR, M. J. COREY, J. W. WARNER, CLAUD BARNES, W. H. FRASER, ASH SERVICE, SAMUEL MARSHBACK, W. W. WICKLINE, J. M. ROBERTSON, P. C. TAYLOR, HENRY GREENLEAF, R. M. COOK, I. W. ALEXANDER, J. W. SWARTZLANDER, HENRY BARADA and E. M. SCOTT (a Voluntary Unincorporated Association),

Complainants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation), (THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA)

NIA (a Corporation), and THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA (a Corporation), and THE SOUTHERN PACIFIC [250] RAILROAD COMPANY OF NEW MEXICO (a Corporation), Consolidated, and HOMER S. KING, as Trustee), THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York (a Corporation), THE KERN TRADING AND OIL COMPANY (a Corporation), JULIUS KRUTTSCHNITT, J. H. WALLACE, J. L. WILLCUTT, W. A. WORTHINGTON, E. E. CALVIN, EDWARD T. DUMBLE, GEORGE L. KING, C. H. REDINGTON, W. R. SCOTT, J. E. FOULDS, J. A. JONES, WILLIAM F. HERRIN, I. W. HELLMAN, JAMES WILSON, E. K. AINSWORTH, WILLIAM HOOD, A. K. VAN DEVENTER, JOSEPH HELLEN and WILLIAM MAHL,

Defendants.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing two hundred and forty-nine (249) typewritten pages, numbered from 1 to 249, inclusive, and comprised in one volume, to be a full, true and correct copy of the pleadings, and of all papers and proceedings upon

which the final decree was made and entered in said cause, and also of the opinion of the Court, the petition for appeal, assignment of errors, order allowing appeal and bond on appeal in the above and therein entitled cause, and [251] that the same together constitute the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in said cause.

I do further certify that the cost of the foregoing record is \$210.85, the amount whereof has been paid me by the complainants, George D. Roberts, et al., who are the appellants in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Northern Division, this 31st day of October, in the year of our Lord one thousand nine hundred and eleven, and of our Independence, the one hundred and thirty-sixth.

[Seal] WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of
America, of the Ninth Judicial Circuit, in and
for the Southern District of California. [252]

[Endorsed]: No. 2070. United States Circuit Court of Appeals for the Ninth Circuit. George D. Roberts et al., Appellants, vs. The Southern Pacific Company (a Corporation), and The Kern Trading and Oil Company (a Corporation), Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the Southern District of California, Northern Division.

Received November 1, 1911.

F. D. MONCKTON,
Clerk.

Filed November 13, 1911.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Extending Time to Docket Cause and to File Record.]

United States Circuit Court of Appeals, for the Ninth Circuit.

GEORGE D. ROBERTS et al.,

Appellants,

vs.

THE SOUTHERN PACIFIC COMPANY (a Corporation) et al.,

Appellees.

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said appellants to coket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same hereby is, enlarged and extended to and including the 14th day of November, 1911.

Los Angeles, California, October 9, 1911.

WM. W. MORROW,

Circuit Judge.

[Endorsed]: No. 2070. United States Circuit Court of Appeals for the Ninth Circuit. George D. Roberts et al., Appellants, vs. The Southern Pacific Company et al., Appellees. Order Extending Time to Docket Appeal. Filed Oct. 9, 1911. F. D. Monckton, Clerk. Refiled Nov. 13, 1911. F. D. Monckton, Clerk.

No. 2075

United States
Circuit Court of Appeals
For the Ninth Circuit.

D. HOGENDORN,

Plaintiff in Error,

vs.

OTTO DANIEL,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the District of Alaska, Second Division.

FILED

JAN 12 1912

No. 2075

United States
Circuit Court of Appeals
For the Ninth Circuit.

D. HOOGENDORN,

Plaintiff in Error,

vs.

OTTO DANIEL,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the District of Alaska, Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of] Attorneys of Record.

IRA D. ORTON, Nome, Alaska,

WILLIAM A. GILMORE, Nome, Alaska,

Attorneys for Plaintiff.

F. E. FULLER, Nome, Alaska,

Attorney for Defendant.

*In the District Court, District of Alaska, Second
Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Summons.

The President of the United States of America, to
D. Hoogendorn, Greeting:

You are hereby summoned and required to appear and answer the complaint of the plaintiff on file in the office of the Clerk of said Court, at the city of Nome in said District, within thirty days from the service of this Summons upon you, or judgment for want thereof will be taken against you; and you are hereby notified that if you fail to answer the said complaint the plaintiff will take judgment against you for the sum of \$34,150.00/100 and costs of suit, the sum demanded in the complaint.

Witness, The Honorable CORNELIUS D. MURANE, Judge of the said District Court, and the seal

of the said Court hereto affixed, this 16th day of August, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fifth.

[Court Seal] JNO. H. DUNN,
Clerk of the District Court, District of Alaska, Sec.
Division. [1*]

United States Marshal's Office,
District of Alaska, 2nd Division,—ss.

I hereby certify that I received the within Summons on the 16th day of August, 1910, and thereafter, on the 16th day of August, 1910, I served the same at Nome, Alaska, by delivering to and leaving with D. Hoogendorn a copy thereof together with a certified copy of the Complaint filed herein.

Returned this 16th day of August, 1910.

T. C. POWELL,
U. S. Marshal.
By C. H. Hawkins,
Deputy.

Marshal's Costs: \$6.00.

[Endorsed]: Cause No. 2207. District Court,
District of Alaska, —— Division. Otto Daniel,
Plaintiff, vs. D. Hoogendorn, Defendant. Summons.
Filed in the office of the Clerk of the Dist. Court of
Alaska, Second Division, at Nome. Aug. 16, 1910.
Jno. H. Dunn, Clerk. By ———, Deputy. R.
3151. [2]

*Page-number appearing at foot of page of original certified Record.

*In the District Court, for the District of Alaska,
Second Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Complaint.

Plaintiff complains of the defendant and for cause of action alleges:

1.

That on and prior to the 11th day of September, 1906, Fred Ruhl, Henry Ruhl and Harry Ruhl, were the owners of, in the possession of, and entitled to the possession of those two certain placer mining claims situated in the Fairhaven Recording District, District of Alaska, Second Division, on the Imnachuck River, described as placer mining claims Nos. 7 and 8 below Hannum on the Imnachuck River, each containing about twenty acres of placer ground; also a certain building and lot upon which the same is situated, and all the fixtures therein, known as the Golden North Hotel, situated in the Town of Deering, in the Fairhaven Recording District, District of Alaska, Second Division.

That on said date the said Fred Ruhl, Harry Ruhl and Henry Ruhl, made, executed and delivered to the defendant, D. Hoogendorn, a deed, conveying the said [3] property to the said defendant, D. Hoogendorn, which said deed was duly signed, exe-

cuted, acknowledged and delivered to the said defendant; a true copy of which said deed is hereto annexed, marked Exhibit "A" and made a part of this complaint.

2.

That thereafter, and on the 13th day of September, 1906, the said D. Hoogendorn, did for a valuable consideration, make, execute and deliver to said Fred Ruhl, Henry Ruhl and Harry Ruhl, an optional contract for the purchase by said Harry Ruhl, Fred Ruhl, and Henry Ruhl, of the property described in Exhibit "A," which said optional contract is annexed hereto, marked Exhibit "B," and made a part of this complaint.

3.

That thereafter in the City of Portland, State of Oregon, on the 24th day of August, 1907, the said Harry Ruhl, Fred Ruhl and Henry Ruhl, for a valuable consideration, by them received, granted, bargained and sold to the plaintiff, all their right, title and interest in and to said placer mining claims hereinbefore described, together with the right to purchase the same from said D. Hoogendorn, in accordance with the terms of said written contract, Exhibit "B" hereinbefore referred to, and in and by said written contract so entered into on the 24th day of August, 1907, it was provided that in case of the payment of the sum of \$3,540.00, to said D. Hoogendorn, reconveyance [4] of said Golden North Hotel property might be made to said Harry Ruhl; a true copy of said contract so entered into in the City of Portland, State of Oregon, on the 24th day of

August, 1907, is hereto annexed, marked Exhibit "C" and made a part of this complaint.

That said contract Exhibit "C," was duly signed, executed, acknowledged and delivered by said Henry Ruhl, Fred Ruhl and Harry Ruhl, to the plaintiff, herein on the 24th day of August, 1907.

4.

That on the 13th day of September, 1907, plaintiff tendered and offered to said D. Hoogendorn, at Deering, in the Fairhaven Recording District, District of Alaska, the sum of \$3,540.00, being the amount required to purchase said property, in accordance with the terms of said contract, Exhibit "B," and demanded and requested said defendant, D. Hoogendorn, to make, execute and deliver a conveyance of said property in accordance with the terms of said Exhibit "B"; that said defendant, D. Hoogendorn, then and there refused, and has ever since refused, either to accept said sum of \$3,540.00, or to make, execute and deliver said conveyances.

5.

That thereafter and on the 5th day of October, 1907, this plaintiff commenced suit in the District Court for the District of Alaska, Second Division, against the said D. Hoogendorn, and Harry Ruhl, [5] as defendants, to obtain judgment and decree of said District Court, that the said defendant, D. Hoogendorn, be adjudged to accept the sum of \$3,575.00, being said sum of \$3,540.00, with interest, and to execute and deliver to the plaintiff, a deed conveying to him said placer claims, and to execute and deliver to the defendant, Harry Ruhl, in said action, a

deed conveying to said defendant, Harry Ruhl, said Golden North Hotel Building, and the fixtures therein contained, and the lot upon which the same is situate, and to have it adjudged and decreed that in case of failure of said defendant, D. Hoogendorn, to execute said deed the decree of court stand in the place thereof with like effect.

6.

That at the time of the commencement of said suit, the plaintiff paid and deposited into Court, said sum of \$3,575.00, to be paid and delivered to the said defendant, D. Hoogendorn, in accordance with the terms of said contract, Exhibit "B," and the same still remains on deposit in said Court for said purpose or has been paid to defendant or his assignee.

7.

That Harry Ruhl was joined as defendant in said cause, because his consent to become plaintiff therein could not be obtained.

8.

That the said defendant, D. Hoogendorn, after having been served with process, duly appeared [6] in said action, and answered therein, and said cause was thereafter, brought to issue and tried upon its merits, and thereafter on the 26th day of January, 1909, final judgment was duly given and entered therein, a true copy of which is annexed to this complaint, marked Exhibit "D" and made a part thereof.

9.

That thereafter, and on the 26th day of March, 1909, the said defendant, D. Hoogendorn, duly took an appeal from said decree of said District Court for

the District of Alaska, Second Division, to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of superseding said judgment pending said appeal, did on said day file in said cause a supersedeas bond on appeal, which said bond was at the time of the filing thereof presented to the Judge of said District Court, who approved the form and sufficiency of the sureties thereto, and execution on said decree was thereupon stayed pending said appeal.

10.

That said cause was duly heard on appeal, by said United States Circuit Court of Appeals, for the Ninth Circuit, and judgment was duly given and entered therein on the 2d day of May, 1910, by said United States Circuit Court of Appeals for the Ninth Circuit, by which said judgment it was ordered, adjudged and decreed that said decree of said District Court for the [7] District of Alaska, Second Division, be, and the same was thereby affirmed, with costs in the sum of \$———, and the Mandate of said United States Circuit Court of Appeals, so affirming said judgment was duly filed and entered of record in the Office of the Clerk of the United States District Court for the District of Alaska, Second Division, on the 27th day of June, 1910, and said judgment Exhibit "D" has now become final and conclusive.

11.

That said placer mining claims Nos. 7 and 8 below Hannum on the Imnachuck River are valuable only for the placer gold and other mineral contained

therein; that said claims contain large deposits of dirt, gravel and bedrock containing placer gold and other minerals in paying quantities, easily and economically extracted at a large profit. [8]

12.

That the said plaintiff in the month of July, 1907, was residing at Deering, Alaska, and in said month of July, 1907, left for the States without any intention of returning to Alaska, but that he intended to accept a position as marine engineer then promised him at a salary of \$200.00 a month; that on arriving in the City of Seattle on or about the 15th day of July, 1907, the plaintiff entered into negotiations with the Ruhls parties to said contracts, Exhibits "A" and "B" of this complaint, and afterwards purchased the interest of said Ruhls in the said placer claim Nos. 7 and 8 below Hannum as hereinbefore alleged and thereupon plaintiff in the month of Sept., 1907, returned to Alaska for the purpose of perfecting his title to said claims in accordance with said contracts, Exhibits "A" and "B," and of remaining during the winter and mining said claims by the drifting process; that on the refusal of defendant to convey said property to plaintiff and to surrender possession of the same to him, plaintiff was compelled to return to the States and he was thereby, by reason of money spent in paying his expenses in coming to Alaska and returning to the states, and for time lost and wasted damaged in the sum of \$1,500.00; that in the meantime the position which was to be filled by plaintiff, and which had been promised to him had been filled by another person and the plaintiff was unable during

all the winter of 1907 and 1908 to obtain employment, and by reason thereof was damaged in the further sum of \$1,500.00; that in the month of August, 1907, for the purpose of mining and operating on said claim plaintiff purchased a boiler and by reason of [9] the acts and conduct of the defendants in refusing to convey said property to him or to surrender possession to him plaintiff had no use for said boiler and was compelled to make disposition of the same at a loss of over \$150.00 and was thereby damaged in said sum of \$150.00; that in the summer of 1908 plaintiff came to the District of Alaska for the purpose of trying said case of Otto Daniel, Plaintiff, vs. D. Hoogendorn et al., Defendants, hereinbefore set forth; that owing to the said case not being reached for trial until after the close of navigation, plaintiff remained in Alaska during the winter of 1908 and 1909 fully expecting to get possession of said claim and for the purpose of working and operating same, and by reason of the acts and conduct of the said defendant after the trial and judgment obtained in the District Court, District of Alaska, Second Division, in appealing said case and giving said supersedeas bond and preventing the plaintiff from obtaining possession of said claim as set forth was further damaged by the loss of employment and expenses during the fall, winter and spring of the years 1908 and 1909 in the further sum of \$1,000.

That on the 13th day of September, 1907, when said tender was so made to said defendant, D. Hoogen-dorn, hereinbefore referred to, and demand of *conveyance* *said* placer claims made by plaintiff, said

defendant D. Hoogendorn, was in possession of said claims, and thereafter wrongfully and unlawfully retained possession of the same and prevented this plaintiff from mining and extracting the placer gold and other minerals contained therein until the 26th day of March, 1909, and thereafter by means of taking said appeal, [10] filing said supersedeas bond, and obtaining said stay of execution, further wrongfully and unlawfully withheld possession of said premises from plaintiff, and prevented the plaintiff from using and occupying the same and extracting the placer gold and other minerals contained therein, down to the 27th day of June, 1910, whereby plaintiff was damaged in the sum of \$30,000.00.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of \$34,150.00 and costs of suit.

IRA D. ORTON,
Attorney for Plaintiff. [11]

United States of America,
District of Alaska,—ss.

Otto Daniel, being first duly sworn, according to law, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the within and foregoing complaint, knows the contents thereof and believes the same to be true.

OTTO DANIEL.

Subscribed and sworn to before me this 5th day of July, 1910.

[Notarial Seal] JOSEPH E. FOX,
Notary Public, District of Alaska, at ——. [12]

Exhibit "A" [to Complaint—Deed].

"This indenture, Made this 11th day of September, in the year of our Lord 1906 Between Fred Ruhl, Henry Ruhl, and Harry Ruhl, the parties of the first part, and D. HOOGENDORN, party of the second part:

Witnesseth, that the said parties of the first part, for and in consideration of the sum of Three Thousand Dollars, lawful money of the United States to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents Grant, Bargain, Sell, Convey and Confirm unto the said party of the second part, and to his heirs and assigns the following described tracts, lots or parcels of land, situate, lying and being in the Fairhaven Recording Dist., District of Alaska, Described as follows Placer Claims Nos. 7 and 8 Below Hannum on the Imnachuck River. Also that property, and building together with all fixtures therein known as the Golden North Hotel in the town of Deering, Alaska.

TOGETHER with the appurtenances, to have and to hold the said premises, with the appurtenances unto the said party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals

the day and year first above written.

FRED RUHL. [Seal]

HENRY RUHL. [Seal]

By FRED RUHL,

His Atty. in Fact.

HARRY RUHL, [Seal]

By FRED RUHL,

His Atty. in Fact. [13]

Signed, sealed and delivered in the presence of:

WALTER J. WELLS.

ALFRED S. KEPNER.

United States of America,

District of Alaska,—ss.

This is to certify, that on this 11th day of September, A. D. 1906, before me, the undersigned, a Notary Public in and for the District of Alaska, duly commissioned and sworn, came Fred Ruhl, to me known to be the identical individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

[Notarial Seal] ALFRED S. KEPNER,

Notary Public in and for the Dist. of Alaska.

United States of America,

District of Alaska,—ss.

On this 11th day of September, 1906, before me, the undersigned, a Notary Public for the District of Alaska, personally appeared Fred Ruhl, known to

me as the identical person *who* name is subscribed to the within instrument as the Attorney in Fact of Henry Ruhl and Harry Ruhl, and he acknowledged to me that he signed the names of Henry Ruhl and Harry Ruhl as principals [14] and his own name as Attorney in Fact, and as the free act and deed of said Henry Ruhl and Harry Ruhl.

Witness my hand and official seal the day and year in this certificate above written.

[Notarial Seal] ALFRED S. KEPNER,
Notary Public for the District of Alaska.

Filed for record Oct. 15th, 1906, at 2:30 P. M.

GEO. D. CAMPBELL,
Recorder.

United States of America,
District of Alaska,
Second Judicial Division,—ss.

I, Geo. D. Campbell, United States Commissioner, and ex-officio Recorder, of the Fairhaven Recording Precinct, District of Alaska, do hereby certify, that I have compared the preceding with a certain indenture recorded in this office in Book of Deeds, Volume 35, Page 236, records of the Fairhaven Precinct, District of Alaska, and do hereby certify that the same is a correct transcript therefrom and of the whole of said indenture.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office, in the town of Can-dle, Alaska, the 16th day of September, in the year

one thousand nine hundred and seven.

[Seal] GEO. D. CAMPBELL,
U. S. Commissioner and Ex-officio Recorder.”
[15]

Exhibit “B” [to Complaint—Agreement].

“This Agreement, Made and entered into this 13th day of September, A. D. 1906,

By and between D. HOOGENDORN, the party of the first part, and Fred Ruhl, Henry Ruhl and Harry Ruhl the partys of the second part.

WITNESSETH: That Whereas, the said party of the first part being the owner of the following Placer Mining Claim, situate in the Fairhaven Mining District, District of Alaska, and known and particularly described as follows, to wit:

Known as No. Eight and No. Seven below Hannum creek on the Immachuck River; also that property and building together with all fixtures therein known as the Golden North Hotel in the town of Deering, Alaska, desirous of selling the same to the said partys of the second part; and, Whereas said party of the second part is desirous of purchasing said Mining Claims and property of the said party of the first part;

Now Therefore, in consideration of the sum of five dollars (\$5.00) dollars, lawful money of the United States to him in hand paid, the receipt whereof is hereby acknowledged, and other considerations; said party of the firsy part hereby agrees to sell and convey unto the said party of the second part, by a good and sufficient title, the said Mining Claims and prop-

erty for the sum of Thirty-five hundred and forty dollars (\$3540.00) dollars, lawful money of the United States, upon the following conditions:—[16]

The purchase price being \$3,540.00, to be paid on the 13th day of September, 1907, at Deering, Alaska, in the Fairhaven Mining District, District of Alaska.

The said party of the second part shall have the right to take immediate possession of said Mining Claims and to prospect and work the same for the period of 12 months, for the purpose of determining the value of said claims.

Said party of the second part shall work the said premises, during the said period of 12 months in a minerlike manner, with due regard to the safety, development and preservation of said premises as a workable mine.

That if at the expiration of said date, said party of the second part shall desire to purchase said Mining Claims they shall pay to the said party of the first part the said purchase price at the time and in the manner hereinbefore mentioned.

And in case of failure of the partys of the second part, their heirs or assigns, to make said payments at the time or in the manner hereinbefore mentioned, such sum or sums as may have been paid hereunder, shall be forfeited to and shall be retained by the party of the first part, his heirs or assigns as a penalty for non-performance and as liquidated damages, and Notice of Forfeiture is hereby expressly waived, and the partys of the second part, and heirs or assigns, does hereby release from all obligations for

which we may be liable under this contract, in law or equity. [17]

The party of the first part, his heirs or assigns, upon payment to him of said sums of money hereinbefore mentioned make, execute and deliver to the said partys of the second part, his heirs or assigns, a good and sufficient deed or deeds of all the above-described mining property, conveying a good and perfect title, free from all encumbrances.

IN WITNESS WHEREOF, the parties hereto hereunto set their hands and seals the day and year first above written.

D. HOOGENDORN.

Signed, sealed and delivered in the presence of:

E. M. WALTERS.

ANNA RUHL.

United States of America,
District of Alaska,
— Division,—ss.

On this 13th day of September, A. D. One thousand nine hundred and six, personally come before me, Frank W. Redwood, a Notary Public in and for said District, the within named D. Hoogendorn, of Deering, Alaska, to me personally known to be the identical person described within, and who executed the within instrument, and acknowledged to me that he executed the same freely, for the uses and purposes therein mentioned.

Witness my hand and seal this 13th day of September, 1906. [18]

[Notarial Seal] FRANK W. REDWOOD,
Notary Public in and for the District of Alaska,
Deering, Alaska.

My commission expires June, 1908.

Filed for record Oct. 13th, 1906, at 9:30 A. M.

GEO. D. CAMPBELL,
Recorder.

United States of America,
District of Alaska,
Second Judicial Division,—ss.

I, Geo. D. Campbell, United States Commissioner, and Ex-officio Recorder, of the Fairhaven Recording Precinct, District of Alaska, do hereby certify, that I have compared the preceding with a certain indenture recorded in this office, in Book of Agreements, Volume 28, page 233, records of the Fairhaven Precinct, District of Alaska, and do hereby certify that the same is a correct transcript therefrom and of the whole of said indenture.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office, in the town of Candle, Alaska, the 16th day of September, in the year one thousand nine hundred and seven.

GEO. D. CAMPBELL,
U. S. Commissioner and Ex-officio Recorder.” [19]

Exhibit “C” [to Complaint—Deed].

KNOW ALL MEN THAT WHEREAS the undersigned, Henry Ruhl, and Fred Ruhl, were, on the 11th day of September, 1906, the owners of those two

certain mining claims known and described as Claims numbered Seven and Eight below Hannum, on Innachuck, Fairhaven District of Alaska, and the undersigned Harry Ruhl was on said day the owner of that certain property known as the Golden North Hotel, situated in the town of Deering, Alaska; and

WHEREAS, on the 11th day of September, 1906, all said parties above named executed a conveyance of said real property to one D. Hoogendorn, including both of said mining claims and said hotel property, which said conveyance was in fact a mortgage and in connection with which the said D. Hoogendorn executed and delivered back to said mortgagors an option to repurchase all of said property, which said option bears date the 13th day of September, 1906, and gives to the said Fred Ruhl, Henry Ruhl and Harry Ruhl the option to repurchase the whole of said property above described upon the payment to the said D. Hoogendorn of the sum of Three Thousand Five Hundred and Forty (\$3,540.00) Dollars, at Deering, Alaska, on September 13, 1907; and,

WHEREAS, the undersigned have agreed to sell and convey the said two mining claims to Otto Daniel for the consideration of Five Thousand (\$5,000.00) Dollars, of which Three Thousand Five Hundred and Forty (\$3,540.00) Dollars, shall be paid on or before said 13th day of September, 1907, to the said D. Hoogendorn, [20] at Deering, Alaska, by the said Otto Daniel to redeem and repurchase the said real property in accordance with the terms of the agreement of September 13, 1906,

and the balance of which purchase price the undersigned acknowledge to have received in cash at the time of delivery hereof; it being further understood and agreed that the said Otto Daniel will cause the said Golden North Hotel property to be reconveyed to the said Harry Ruhl, and will to that end execute and deliver all necessary conveyances from himself;

Now therefore, this witnesseth, that in consideration of the payment of the said purchase price to the undersigned, Henry Ruhl, Fred Ruhl and Harry Ruhl, in the time and manner above specified and provided for, to wit: Fourteen Hundred and Sixty (\$1,460.00) Dollars cash in hand on this day paid, the receipt whereof is hereby acknowledged, and the balance Three Thousand Five Hundred and Forty (\$3,540.00) Dollars to be paid by the assumption and discharge of said option to purchase held by the undersigned from the said D. Hoogendorn, we, the undersigned, so hereby grant, bargain, sell and convey unto the said Otto Daniel, his heirs and assigns, the said mining claims Numbered Seven and Eight below Hannum on the Imnachuck Fairhaven District, Alaska; together with all the lumber and all other personal property, which is on said mining claims; together with all our rights under said option of repurchase dated September 13, 1906.

TO HAVE AND TO HOLD the same to the said grantee, his heirs and assigns forever. [21]

And we do hereby authorize and empower the said Otto Daniel, in our names and on our behalf, or otherwise, as he may see fit and proper, to make payment of said sum of Three Thousand Five Hundred

and Forty (\$3,540.00) Dollars, to the said D. Hoogendorn, and to take up and obtain conveyance under said option to purchase, it being understood that conveyance of said mining claim shall be made to the said Otto Daniel, and that, if possible, conveyance of said hotel property shall be made to said Harry Ruhl; but if the said D. Hoogendorn shall insist upon making but one conveyance, then all of said properties shall be conveyed to said Otto Daniel, and he shall make and deliver all proper and necessary conveyances to vest the title to said hotel property in said Harry Ruhl.

IN WITNESS WHEREOF said grantors have hereunto set their hands and seals at Portland, Oregon, this 24th day of August, A. D. 1907.

HENRY RUHL. [Seal]

FRED RUHL. [Seal]

By HENRY RUHL,
His Attorney in Fact.

HARRY RUHL. [Seal]

By HENRY RUHL,
His Attorney in Fact.

Signed, sealed and delivered in the presence of us:

A. L. VEAZIE.

H. K. SARGENT.

State of Oregon,

County of Multnomah,—ss.

This certifies that on this 24th day of August, 1907, before me, the undersigned, [22] personally appeared Henry Ruhl, and also appeared Fred Ruhl and Harry Ruhl, by Henry Ruhl, their attorney in fact, all known to me to be the identical persons

named in and who executed the foregoing instrument and acknowledged to me that they executed the same; and this said Henry Ruhl, as attorney in fact for the said Fred Ruhl and Harry Ruhl, acknowledged to me that he executed the same on behalf of each of them.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this the day and year last above written.

[Notarial Seal] A. L. VEAZIE,
 Notary Public for Oregon.” [23]

Exhibit “D” [to Complaint—Decree].

“*In the District Court, District of Alaska, Second
Division.*

OTTO DANIEL,

Plaintiff,
vs.

D. HOOGENDORN and HARRY RUHL,
Defendants.

DECREE.

The above-entitled action having been regularly tried before the Court on the 23, 24 and 25th days of November, 1908, the plaintiff being represented by Mr. Ira D. Orton, his attorney, and the defendant, D. Hoogendorn, being represented by Mr. Neville H. Castle, and Mr. F. E. Fuller, his attorneys, no appearance being made for the defendant, Harry Ruhl, and the Court after having heard the evidence and arguments of counsel having made and filed herein in his Findings of Fact and Conclusions of Law in writing, and having directed that a judg-

ment and decree be entered in accordance therewith,—

Now, therefore, by virtue of the law and the premises, it is by the Court Ordered, Adjudged and Decreed as follows: [24]

1.

The defendant, D. Hoogendorn, is hereby adjudged and decreed to accept the sum of \$3,575.00, deposited in court and now in the possession of the Clerk of this court, and to execute a deed to plaintiff conveying to him the placer mining claims mentioned and described in plaintiff's complaint, and hereinafter particularly described, and to execute and deliver to the defendant, Harry Ruhl, a deed to the Golden North Hotel property, described in said plaintiff's complaint and hereinafter particularly described.

2.

It is further ordered, adjudged and decreed, that in case of failure of the said D. Hoogendorn, for ten days after the entry of this decree to execute and deliver said deeds, that this decree stand in the place thereof, with like effect.

3.

It is further ordered, adjudged and decreed, that the defendant, D. Hoogendorn, be, and he is perpetually enjoined and restrained from mining, working or extracting gold from said placer mining claims in plaintiff's complaint and hereinafter described.

4.

It is further ordered, adjudged and decreed, that the plaintiff, Otto Daniel, be let into possession of

said placer claims, and that said defendant, Harry [25] Ruhl, be let into possession of the Golden North Hotel property, lot, and the fixtures therein contained.

5.

The said placer mining claims hereinabove referred to are particularly described as follows, to wit:

Those two certain placer mining claims situate in the Fairhaven Recording District, District of Alaska, on the Imnachuck River, described as Placer Mining Claims Number Seven (7) and Number Eight (8) Below Hannum on the Imnachuck River, each containing about twenty (20) acres of placer ground.

6.

The said Golden North Hotel property hereinabove referred to is particularly described as follows, to wit:

That certain building and lot on which the same is situated, and all the fixtures therein, known as the Golden North Hotel, situated in the town of Deering, in the Fairhaven Recording District, District of Alaska.

7.

It is further ordered, adjudged and decreed that the plaintiff, Otto Daniel, have and recover of and from the defendant, D. Hoogendorn, his costs of suit taxed at \$——. [26]

Done in open court at Nome, Alaska, this 26th day of January, A. D. 1909.

ALFRED S. MOORE,
United States District Judge.

[Endorsed]: #1802. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn et al., Defendants. Decree. Filed in the Office of the Clerk of the Dist. Court, of Alaska, Second Division, at Nome. Jan. 26, 1909. Jno. H. Dunn, Clerk. By _____, Deputy. Ira D. Orton, Attorney for Pltff. Vol. 7, Orders and Judgments, p. 40. Comp. J. D. 2 page 82 McB."

[Endorsed]: #2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Aug. 16, 1910. Jno. H. Dunn, Clerk. By _____, Deputy. Ira D. Orton, Attorney for Plaintiff. [27]

*In the District Court for the District of Alaska,
Second Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Motion to Strike Matter from Complaint.

Comes now the defendant, by his attorney, and, upon the pleadings, records, and files herein, moves the Court to strike out from the plaintiff's complaint herein the following parts thereof:

All of paragraph numbered 5;

All of paragraph numbered 6;

All of paragraph numbered 7;

All of paragraph numbered 8;

All of paragraph numbered 9;

All of paragraph numbered 10;

All of paragraph numbered 12, from the beginning thereof down to and including the figures “\$1,000,” in line 22 on page 8;

Upon the grounds that the matter therein contained is irrelevant and redundant.

F. E. FULLER,

Attorney for Defendant.

Service of a copy of the foregoing Motion this 13th day of September, 1910, at —— M., admitted.

IRA D. ORTON,

Attorney for Plff.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Motion to Strike Out Matter from Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sep. 13, 1910. John Sundback, Clerk. By ———, Deputy. Z. F. E. Fuller, Attorney for Defendant. [28]

[Order Denying Motion to Strike.]

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, Regular 1910, Term begun and held at the Town of Nome, in said District and Division, commencing January 24, 1910.

Saturday, December 3, 1910, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. CORNELIUS D. MURANE, Judge.

John Sundback, Clerk.

T. M. Reed, Deputy Clerk.

Bernard S. Rodey, U. S. Attorney.

Thos. C. Powell, U. S. Marshal.

Now upon the convening of court the following proceedings were had:

2207

DANIELS

vs.

HOOGENDORN.

The Court rendered an opinion herein on the motion to strike a portion of the complaint and denied said motion. [29]

*In the District Court for the District of Alaska,
Second Division.*

No. 2207.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Answer.

Comes now the defendant, by his attorney, and answering plaintiff's complaint,

Denies that the defendant executed or delivered the optional contract mentioned in paragraph numbered 2 of said complaint for a valuable, or any, consideration;

Denies any knowledge or information sufficient to form a belief of the allegations of paragraphs numbered 3 and 7 of said complaint, and therefore denies each and every of the allegations in the said paragraphs contained; and

Denies each and every allegation contained in paragraphs numbered 4 and 12 of said complaint.

Wherefore, the defendant demands judgment that the plaintiff take nothing by his said action and that the defendant recover from the plaintiff the costs of this action.

F. E. FULLER,
Attorney for Defendant.

District of Alaska,—ss.

F. E. Fuller, being first duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that he believes the same to be true; that he makes this affidavit and verification in behalf of the defendant for the reason that the defendant is without the District of Alaska.

F. E. FULLER.

Subscribed and sworn to before me this 18th day of July, 1911.

[Notarial Seal]

O. D. COCHRAN,
Notary Public. [30]

Due service of within answer is hereby admitted this 18th day of July, 1911.

IRA D. ORTON.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Answer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 18, 1911. John Sundback, Clerk. By ———, Deputy. F. E. Fuller, Attorney for Defendant.
[31]

In the District Court, District of Alaska, Second Division.

No. ——.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Def.

Verdict.

We, the jury in the above-entitled action, duly empanelled and sworn, do find a verdict in favor of the plaintiff and against the defendant and assess the damages in the sum of \$10,275.00.

Dated at Nome, Alaska, this 4th day of October, 1911.

WALTER H. JOHNSON,
Foreman.

[Endorsed]: In the District Court, District of Alaska, Second Division. No. 2207. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Verdict. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 4, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. L. [32]

In the District Court, District of Alaska, Second Division.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Judgment.

The above-entitled action having been regularly tried before the above-entitled court, sitting with a jury duly empaneled; Messrs. Ira D. Orton and W. A. Gilmore, appearing as attorneys for the plaintiff, and Mr. F. E. Fuller, appearing as attorney for the defendant, and the jury after hearing the evidence and the instructions of the Court, having returned their verdict wherein they found for the plaintiff and against the defendant, and assessed the damages in the sum of Ten Thousand Two Hundred and Seventy-five Dollars (\$10,275), and the defendant having thereafter duly filed a motion for a new trial, and the Court on the hearing of said motion having ordered that unless the plaintiff remit from said verdict the sum of Three Thousand Five Hundred

and twenty-five Dollars (\$3,525), making the judgment to be entered herein the sum of Six Thousand Seven Hundred and Fifty Dollars (\$6,750) a new trial of said action would be granted; and the plaintiff having thereupon remitted from said verdict the said sum of [33] Three Thousand Five Hundred and Twenty-five Dollars, (\$3,525), and thereupon defendant's motion for a new trial having been denied by the Court;

NOW, THEREFORE, by virtue of the law and the premises, it is by the Court ORDERED and ADJUDGED that the plaintiff have and recover of and from the defendant the sum of Six Thousand Seven Hundred and Fifty Dollars (\$6,750) to bear interest from the date hereof at the rate of eight per cent per annum, and his costs of suit taxed at \$26.05.

Done in open court at Nome, Alaska, this 14th day of October, 1911.

CORNELIUS D. MURANE,
U. S. District Judge.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Judgment. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 14, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. Ira D. Orton, Attorney for Pltff. J. D. 2, p. 190, Vol. 9 Orders and Judgments, P. 162. [34]

*In the District Court for the District of Alaska,
Second Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Bill of Exceptions.

This cause came on regularly for trial in the above-named court at a regular term thereof, before Honorable Cornelius D. Murane, District Judge, and a jury, on Wednesday, October 4, 1911, Ira D. Orton and W. A. Gilmore appearing for the plaintiff and F. E. Fuller appearing for the defendant. A jury was duly impanelled and sworn, and thereupon the following proceedings were had and testimony taken, to wit:

[Testimony of Otto Daniel, the Plaintiff.]

OTTO DANIEL, a witness for plaintiff, testified:

I am the plaintiff in this case. I know Mr. Hoogendorn, of course. In the fall of 1907 and the summer of 1907 I was residing, in the month of July; at Deering. From Deering, at that time I went outside to the States. My business or profession is marine engineer. At that time I had papers as chief engineer on all vessels plying in waters in any part of the world. Prior to that time I had had experience as chief engineer and marine engineer.

Q. Without going into details name some of the vessels that you have worked on prior to that time,

(Testimony of Otto Daniel.)

in July, 1907, prior to that time?

To which question the defendant objected as being wholly immaterial and irrelevant. The Court overruled the objection, [35] to which ruling defendant duly excepted.

Witness answering: On the China passenger lines—vessels, plying from the Pacific coast.

Witness continuing: Steamers of approximately three or four thousand tons. I have been in the business off and on over 20 years; after I went to Seattle I met with the defendants, the Ruhls there, I met them in Portland; I made a contract with these gentlemen that is set forth in the complaint; after making that contract I returned to Alaska and arrived in Nome on my return about the middle of September.

Q. Now, for what purpose did you come back to Alaska?

Which question was objected to by the defendant as immaterial and irrelevant. The Court overruled the objection, to which ruling the defendant duly excepted.

Witness answering: I came back for the purpose of working the ground which I had bought; prior to this time I had been familiar with claims Nos. 7 and 8 below Hannum Creek; they had been worked prior to that time by the process of winter mining, that is drifting, taking out a dump in the winter and sluicing it up in the summer; I went to Deering that fall, found D. Hoogendorn in possession of the ground at that time; I returned to Nome after that time on the last steamers.

(Testimony of Otto Daniel.)

Q. At that time, had you made any preparation for mining that property, in the way of purchasing any mining machinery, supplies and so forth?

Objected to by defendant as incompetent and immaterial, having nothing to do with any damages for withholding his property, or the damages claimed in the complaint.

The Court overruled the objection; to which ruling the defendant duly excepted.

Witness answering: Previous to returning to Nome for the purpose of mining this property I bought a boiler in Seattle, in Tacoma, rather, I shipped it to Deering. [36]

Q. What did you pay for the boiler?

Objected to by defendant as incompetent, immaterial and not to be considered as an element in estimating damages in this case. The Court overruled the objection; to which ruling defendant duly excepted.

Witness answering: Three hundred dollars; I bought a boiler in Tacoma of a private person. I made inquiries at that time about the price of boilers of dealers in that kind of goods; I am familiar with boilers and the prices of them; I have had about thirty years experience with boilers and the price of that boiler was very reasonable.

Q. Were you able to use the boiler in operating the claim that winter?

Objected to as incompetent, as calling for incompetent and immaterial testimony, which objection was by the Court overruled and plaintiff's objection

(Testimony of Otto Daniel.)

to such ruling allowed and thereupon plaintiff answered to said question.

A. No. I returned to the States that fall.

Q. Now, prior to your coming to Alaska for the purpose of redeeming this property you purchased, from Mr. Hoogendorn, as you have testified, to work that winter, state whether or not you could have obtained, or had any offers of employment for the winter at your regular line of business or occupation?

Question objected to as calling for incompetent and irrelevant testimony; that it has not been shown that plaintiff came to Alaska for the purpose of purchasing or redeeming this property; that the testimony called for has nothing to do with damages recoverable in this case and is not a proper element of damages herein.

The Court overruled the objection; to which ruling the defendant duly excepted. [37]

Witness answering: I had.

Q. From whom?

Objected to as incompetent, irrelevant and immaterial. The Court overruled the objection; to which ruling defendant duly excepted and thereupon witness answered.

A. From Boston Steamship Company, in the capacity of chief engineer.

Q. At what rate of wages?

Objected to as incompetent, and irrelevant and not a proper basis for fixing damages recoverable in this case. The Court overruled the objection; to which ruling defendant duly excepted.

(Testimony of Otto Daniel.)

Witness answering: At one hundred and fifty dollars up to two hundred dollars, depending upon the size of the vessels with board.

Before

Witness continuing: After returning to the States that fall I first decided to bring a suit; after the commencement of this suit I returned to the States; I was not able to obtain employment as chief engineer after that time for the winter, after I had returned from Alaska, for the reason that I could not take a position, only temporarily, and they do not usually give a position of that kind, without one takes a position of permanency; I could not have got one; I was not employed down there during the winter; I was not able to get employment during the winter as marine engineer; I returned to Alaska after that or in the following spring for the purpose of getting the property as soon as I possibly could; I had a case pending at that time; during that summer I worked for the Fairhaven Water Company, part of the time, I don't remember how much; I didn't work all the time; I arrived here, or in Deering, on one of the first boats, as near as I can remember about the middle of June, June 12th to 15th; I went to Deering, that is the spring of 1908, that was the spring I returned to Alaska and went to Deering; in the fall of 1908; I did not go again to the States; I stayed in [38] Deering that winter; I worked a little that winter for the Fairhaven Water Company; I made a hundred and eighty dollars during the winter, from the close of navigation until some time next spring,

(Testimony of Otto Daniel.)

until the opening of navigation; during the winter of 1908 and 1909 if I had had the possession of this property I could have worked this property by the *drifting process*; this ground in the river channel is only five or six feet to bedrock but on what we *call*

it is probably eight or ten feet to bedrock; there is gravel only about two or three feet on top of the bedrock; there is a little clay with the gravel.

in and the spring of 1909,

Q. Now, ~~during~~ the winter of 1908 and 9, state state what arrangements, if any, you made with the ~~whether or not if you had had the possession of this~~ Fairhaven Water Company to work the ground could ~~property you could have worked the same by the~~ you have obtained possession of it?

~~drifting process?~~

Objected to as incompetent, irrelevant and immaterial, and as having nothing to do with and not furnishing any basis upon which damages could be estimated in this case.

Which objection was by the Court overruled and defendant's objection to said ruling allowed.

Witness answering: I had arranged with them to work it on a royalty of about forty per cent—forty per cent of the whole to me; they were to work the ground with hydraulic elevators during the summer time.

Q. State whether or not the Fairhaven Water Company had any supply of water, ditches, pipe-lines and in such manner that they could have mined it.

Objected to as irrelevant as calling for irrelevant

(Testimony of Otto Daniel.)

and incompetent testimony and not referring to any particular time.

The Court overruled the objection; to which the defendant duly excepted. [39]

Q. I am referring, Mr. Daniel, to the season of 1909—the summer of 1909. A. Yes.

Witness continuing: They had a supply of water of six thousand inches; from the close of navigation 1908 until the opening of navigation 1909, I testified that I worked to the extent of one hundred and eighty dollars for the Fairhaven Water Co.; I did whatever there was for me to do all the time I had anything to do; there was no other work I might have gotten during that period.

Q. For what purpose were you remaining in during that winter?

Objected to by defendant as incompetent, irrelevant and immaterial.

Mr. ORTON.—The purpose is to show that he stayed in for the purpose of trying this lawsuit for the possession of the property that winter.

Mr. FULLER.—We object to it as incompetent testimony. That certainly is not an element of damages that he stayed in intending to try a lawsuit.

Objection overruled by the Court; to which ruling defendant duly excepted.

A. To get possession of the ground.

Q. Now, could you have mined the ground if you could have got possession of it, during that winter of 1908 and 1909, by the drifting process.

Objected to as calling for a conclusion of the wit-

(Testimony of Otto Daniel.)

ness and is incompetent testimony.

Objection overruled by the Court; to which ruling defendant duly excepted.

Witness answering: Yes.

Witness continuing: I first obtained possession of this property last year in June, about June 27th, 1910; after I obtained possession the property was worked by the Fairhaven Water Co.

Q. Under what arrangement? [40]

Objected to as incompetent; that a person cannot fix the measure of damages by the work that was done after they brought suit.

Objection overruled by the Court; to which ruling defendant duly excepted.

Witness continuing: Forty per cent lay; forty per cent was paid to me; forty per cent of the gross; the Fairhaven Water Company mined it by hydraulic elevators.

Q. What amount of gold did they take out?

Objected to as irrelevant, incompetent and immaterial and that it is not proper to prove the amount of damages by what was taken out after the violation of the contract.

Objection overruled by the Court; to which ruling defendant duly excepted.

Witness answering: Thirty-six thousand and some odd dollars. I was present at the cleanups; of this thirty-six thousand dollars forty per cent was paid over to me as owner of the ground; I have a memorandum of the amount of gold taken out, and the exact amount is thirty-six thousand, three hundred and

(Testimony of Otto Daniel.)

fifty-eight dollars and thirty-five cents; I first came to Alaska in the year 1905, when the company first started.

Q. What portion of these claims was mined by the Fairhaven Water Company during the year 1910, in size, in taking out this thirty-six thousand, three hundred and fifty dollars.

Mr. FULLER.—That is objected to as irrelevant and incompetent.

Mr. ORTON.—The purpose is to show how much of the ground was mined for the purpose of giving some knowledge of the value of the ground.

Mr. FULLER.—I insist upon my objection; that because in mining so much of the ground so much gold was extracted does not go to show that the whole claims are that valuable.

Objection overruled by the Court; to which ruling the defendant duly excepted. [41]

Witness answering: We worked out two pits, two hundred feet square on claim No. 7; I am familiar with hydraulic mining at the present time, but was not previous to my experience in Alaska; I have been working since 1910 for the Fairhaven Water Company; it mined this property in an economical manner.

Q. Do you know how much money they expended in taking out this thirty-six odd thousand dollars?

Objected to has irrelevant.

Objection overruled by the Court, to which ruling the defendant duly excepted.

Witness answering: I do, yes, sir.

(Testimony of Otto Daniel.)

Q. What amount?

Objection renewed and overruled by the Court; to which ruling defendant duly excepted.

Witness answering: Nine thousand four hundred and thirty-five dollars and twenty-five cents; in the year 1910.

Q. From *you* knowledge of the ground and the conditions existing in the country in 1907 and 8, state whether these claims could have been mined at a profit by the drifting process.

Objected to as incompetent, which objection was by the Court overruled, and to which ruling defendant duly excepted.

Witness answering: I believe so.

Q. What with reference to 1907 and 8, the winter of 1907 and 1908, could they have been mined or operated at a profit during that winter?

Objected to as irrelevant and incompetent.

Objection overruled by the Court; to which ruling defendant duly excepted.

A. Yes, sir.

Q. State whether or not this year, this summer last past, these claims have been mined this last season.

Objected to as irrelevant and incompetent and not the proper way of measuring damages. [42]

Objection overruled by the Court; to which ruling defendant duly excepted.

Witness answering: Yes, they have; by the Fairhaven Water Company, under an arrangement for forty per cent; the company so far as I know this last

(Testimony of Otto Daniel.)

summer—in the mining by the company over seventy thousand dollars was taken out; they were still mining at the time I left, four days ago; forty per cent royalty was paid me of this gross amount taken out; I could not tell the exact amount of the expenses of mining these claims during the last summer.

Q. Well, can you give approximately the amount of the expenses?

Objected to as asking for an opinion of the witness, and that the witness has testified that he does not know what the expenses were.

Objection overruled by the Court; to which ruling the defendant duly excepted.

Witness continuing: I have been working for the company myself this summer and know approximately about the expenses they have been to; in the winter I am resident manager for the Fairhaven Water Company; in the summer time I clean up the gold; I am familiar with their expenditures; I can give a reasonably correct estimate of the expenditures of working this ground this last summer; they are so far about twenty thousand dollars.

Plaintiff offers in evidence Summons, Amended Complaint, Answer, Findings of Fact and Conclusions of Law, Decree, Undertaking on Appeal and Mandate in the case of Otto Daniel vs. D. Hoogen-dorn and Harry Ruhl, No. 1802 in the District Court and the same were marked Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," and "H."

Defendant objected to each of said papers as irrelevant, incompetent and not material to the issues in

(Testimony of Otto Daniel.)

this case. Each of which objections was overruled by the Court, to which [43] rulings defendant duly excepted.

And thereupon papers were read in evidence.

Witness continuing:

Cross-examination.

I include in the items of expense for the work there this year, labor, cost of maintenance for the ditch and supplies; I could not tell what was spent for labor; I do not know how much was spent for supplies; I got these figures from the bookkeeper; I do not know anything about them of my own knowledge; I believe allowance was made for the use of the water; I could not tell you how much; I could not say that any allowance was made for the use of the water; the company worked these claims separately; I could not tell you what was the amount incurred in the maintenance of the ditch, nor what that item of expense amounted to.

Defendant moves to strike out the testimony of the witness with reference to expense incurred, for the reason that his testimony now shows that he does not know anything about it of his own knowledge and that his testimony is hearsay and incompetent.

The motion was denied by the Court and to the ruling of the Court the defendant duly excepted.

Witness continuing: My knowledge in regard to 1910 is the same as that for 1911 as to the expenses; I do not know anything more about it.

(Testimony of Otto Daniel.)

Defendant moves to strike out the testimony of the witness in regard to the items of expense for 1910.

Motion was denied by the Court and defendant duly excepted to the ruling.

Redirect Examination.

I have seen the books of the company and the entries in regard to the items of expenditures for the operation of these mining claims for both these seasons; I know whether the books are accurately kept or not; J. F. McCulloch is the bookkeeper; I believe he is a competent bookkeeper.

Plaintiff's testimony closed. [44]

Thereupon defendant moved the Court to strike from the record all the testimony of the witness relating to his coming to Nome in the year 1907 and returning from Deering to Portland in the year 1907 and returning again in 1908 as being irrelevant and incompetent testimony and relating to matters after the breach of contract alleged in this case.

Motion was denied by the Court and the defendant duly excepted to the ruling.

Defendant also moved to strike out the testimony of the witness relating to plaintiff's opportunity to obtain employment during the winter of 1907 and 1908 as irrelevant and incompetent and occurring after the breach of contract alleged in the complaint.

Motion was denied by the Court and defendant duly excepted to the ruling.

Thereupon the defendant moved the Court for a

judgment of nonsuit on the grounds that the plaintiff had failed to prove a case sufficient to be submitted to the jury.

The motion was denied by the Court and defendant duly excepted to the ruling.

And thereupon the case was closed and the Court instructed the jury orally.

The following are all the instructions given to the jury by the Court: [45]

[Instructions.]

Gentlemen of the Jury:

This is the case of O. Daniel against D. Hoogen-dorn to recover damages for a breach of contract made by D. Hoogendorn in 1907 with Harry Ruhl and others.

The plaintiff makes certain allegations in his complaint which are denied by the same answer of the defendant. The pleadings you will take to your jury-room with you, and if you have any doubt in your minds as to what the allegations are you will ascertain from the pleadings.

The burden of proof is upon the plaintiff to prove the allegations of his complaint wherever they are denied by the answer.

The plaintiff demands damages for several different items; one for loss of time, one for services which he might have earned; one for having purchased certain boiler, and also for interest on the profits which he might have made in mining the ground.

In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony

that you should allow him any, you will allow him for the time which he was kept out of the possession of the property and could have been profitably employed in working the property. You may then allow him such damages as he might have earned at his profession, or trade, whatever it might be, less any amount that he may have earned in the meantime, for the time he was kept out of the possession of said mining claims.

If you find from the evidence that he purchased a boiler and other machinery and supplies for working this property, and that he was unable to employ this machinery in that capacity, or rent it, or use it in any other way, he would then be entitled to interest on the money invested in that machinery, during the time that he was kept out of the possession by reason of the wrongful act of the defendants. [46]

If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 8, and 1908 and 9, and the summers of 1908 and 1909, he would be entitled to legal interest, at the rate of eight per cent per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money.

You are the sole judges of the weight and sufficiency of the testimony of the witnesses. Your power of judging, however, is not to be exercised in an arbitrary manner, but with discretion and in subordination to the rules of evidence.

You may take into consideration the interest a party has in the result of this lawsuit, his bias or

prejudice, if either appear, his candor or evasion while testifying, and applying your knowledge of human actions and affairs and motives, you will ascertain the truth, and present it in your verdict.

You are not bound to find in conformity with the testimony of any number of witnesses who do not produce conviction on your minds, against a lesser number or other evidence satisfying your minds.

After you have retired to your jury-room, you will take the pleadings and the exhibits with you, and when you have arrived at your verdict, and agreed on your verdict, you will by your foreman whom you have selected, sign the one upon which you agree and return it into court as your verdict in this case. [47]

Mr. FULLER.—Might I request one instruction further, and ask the Court to instruct the jury that damages must be proved with certainty. That damages cannot be presumed but must be proved with certainty.

Mr. ORTON.—I think such request for instructions should be in writing.

The COURT.—Yes, if you will submit your request for instruction in writing I will mark it as refused, if you desire.

Mr. ORTON.—I desire to call the Court's attention to the fact that the testimony was that there was no other machinery or supplies except a boiler, and that the plaintiff does not claim for anything else besides a boiler.

The COURT.—Yes; I will instruct you, gentlemen of the jury, that the only kind of machinery which is claimed for was a boiler, and in arriving at your

verdict you will take into consideration the fact, if you so find from the testimony, that plaintiff purchased a boiler and moved it onto the claims, and the same method should be employed in computing the damages in this case, if you should find said boiler was purchased and that the plaintiff was prevented from using the same, for the price of such boiler.

[48]

[Exceptions to Instructions.]

And thereupon the defendant duly excepted to the following instruction given to the jury by the Court:

In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony that you should allow him any, you will allow him for the time during which he was kept out of the possession of the property he could have been profitably employed in working the property.

For the reason that such instruction does not state the proper rule for assessing damages, that the damages claimed are not the necessary or proximate result of being kept out of the possession of the property and may not be allowed in any case in this action.

And thereupon the defendant duly excepted to the following instruction given to the jury by the Court:

You may then allow him such damages as he could have earned at his profession or trade, whatever you may call it, lost on account of time, less any amount that he may have earned in the meantime, for the time that he was kept out of possession.

Upon the ground that any sums plaintiff could have earned at his profession or trade are not properly considered in estimating damages in this case; that allowing any addition of damages for loss of wages is allowing double compensation for the same damages, claimed by reason of loss of time, and that such damages are not the necessary, usual, or proximate result of the breach of contract alleged in this action.

And thereupon the defendant duly excepted to the following instruction given to the jury by the Court:

If you find from the evidence that he purchased a boiler and other machinery and supplies for working this property, and that he was unable to employ this machinery in that capacity or rent it or use it in any other way, he would then be entitled to interest on the money invested in that machinery during the time that he was kept out of the possession by reason of the wrongful act of the defendants.

For the reason that the matters therein alleged may not properly be considered in estimating damages in this action; that there was no certain or competent testimony upon which to base such instruction; that such damages are remote, [49] speculative and uncertain and not within the contemplation of the parties within the time of making the contract.

And thereupon the defendant duly excepted to the following instruction given to the jury by the Court:

If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 8 and 1908

and 9, and the summers of 1908 and 1909, he would be entitled to legal interest at the rate of 8 per cent per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money.

For the reason that such instruction does not state a proper rule for estimating damages in this action, that said instruction is indefinite, uncertain and gives no rule by which the jury could arrive at any certain amount of damages; that it allows the rate of damages to be fixed by contract made by plaintiff with third parties long after the original contract and after the breach thereof, and that the damages allowed are remote, uncertain and speculative.

It is stipulated that the foregoing Bill of Exceptions is correct and may be settled and allowed.

IRA D. ORTON,
Attorney for Plaintiff.

F. E. FULLER,
Attorney for Defendant.

**[Order Settling and Allowing Bill of Exceptions,
etc.]**

The foregoing Bill of Exceptions having been duly filed and presented is hereby settled and allowed; and I hereby certify that the same contains all the evidence given upon the trial of said action.

Dated October 25, 1911.

CORNELIUS D. MURANE,
District Judge. [50]

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto

Daniel, Plaintiff, vs. D. Hoogendorn, Defendant.
Bill of Exceptions. Filed in the Office of the Clerk
of the District Court of Alaska, Second Division, at
Nome. Oct. 25, 1911. John Sundback, Clerk. By
J. Allison Bruner, Deputy. F. E. Fuller, Attorney
for Deft. [51]

*In the District Court for the District of Alaska, Sec-
ond Division.*

OTTO DANIEL, Plaintiff,
vs.
D. HOOGENDORN, Defendant.

**Petition for Writ of Error and Assignment of
Errors.**

D. Hoogendorn, defendant in the above-entitled action, feeling himself aggrieved by the proceedings had in said action and by the judgment given therein, on October 14, 1911, against said defendant, for the sum of \$6,750.00 and costs, comes now, by his attorney, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and for an order fixing the amount of security for costs to be given upon such writ of error. And said defendant now specifies and assigns the following as the errors upon which he will rely upon such writ:

Assignment of Errors.

1. The Court erred, by its order made December 3, 1910, denying defendant's motion to strike from

plaintiff's complaint paragraphs numbered 5 to 10, inclusive.

2. The Court erred, by its order made December 3, 1910, denying defendant's motion to strike from plaintiff's complaint that part of paragraph numbered 12 from the beginning thereof down to and including the figures "1000" in line 22, page 8, as follows:

"That the said plaintiff in the month of July, 1907, was residing at Deering, Alaska, and in said month of July, 1907, left for the States without any intention of returning to Alaska, but that he intended to accept a position as marine engineer then promised him at a salary of \$200.00 a month; that on arriving in the City of Seattle on or about the 15th day of July, 1907, the plaintiff entered into negotiations with the Ruhls parties to said contracts, Exhibits "A" and "B" of this complaint, and afterwards purchased the interest of said Ruhls in the said placer claims Nos. 7 and 8 below Hannum as herein-before alleged and thereupon plaintiff in the month of Sept., 1907, returned to Alaska for the purpose of perfecting his title to said claims in accordance with said contracts, [52] Exhibits "A" and "B," and of remaining during the winter and mining said claims by the drifting process; that on the refusal of defendant to convey said property to plaintiff and to surrender possession of the same to him, plaintiff was compelled to return to the States and he was thereby, by reason of money spent in paying his expenses in coming to Alaska and returning to the States, and for time wasted damaged in the sum of

\$1,500.00; that in the meantime the position which was to be filled by plaintiff, and which had been promised to him had been filled by another person and the plaintiff was unable during all the winter of 1907 and 1908 to obtain employment, and by reason thereof was damaged in the further sum of \$1,500.00; that in the month of August, 1907, for the purpose of mining and operating on said claim plaintiff purchased a boiler and by reason of the acts and conduct of the defendants in refusing to convey said property to him or to surrender possession to him plaintiff had no use for said boiler and was compelled to make disposition of the same at a loss of over \$150.00 and was thereby damaged in said sum of \$150.00; that in the summer of 1908 plaintiff came to the District of Alaska for the purpose of trying said case of Otto Daniel, Plaintiff, vs. D. Hoogendorn et al., defendants hereinbefore set forth; that owing to the said case not being reached for trial until after the close of navigation, plaintiff remained in Alaska during the winter of 1908 and 1909 fully expecting to get possession of said claim for the purpose of working and operating same, and by reason of the acts and conduct of the said defendant after the trial and judgment obtained in the District Court, District of Alaska, Second Division, in appealing said case and giving said supersedeas bond and preventing the plaintiff from obtaining possession of said claim as set forth was further damaged by the loss of employment and expenses during the fall, winter and spring of the years 1908 and 1909 in the further sum of \$1,000."

3. The Court erred in overruling defendant's objection to the following question asked the plaintiff upon the trial:

"Q. At that time had you made any preparations for mining that property, in the way of purchasing any mining machinery, supplies and so forth?"

In answer to which question the witness stated that previous to returning to Nome, for the purpose of mining this property, he had bought a boiler in Tacoma, shipped it to Deering; that he paid three hundred dollars for the boiler; that the price was reasonable; and that he was not able to use the boiler in operating the claim that winter.

4. The Court erred in overruling defendants' objection to the following question asked the plaintiff upon the trial:

"Q. Now, prior to your coming to Alaska for the purpose of redeeming this property you purchased from Mr. Hoogendorn, as you have testified, to work that winter, state whether or not you could [53] have obtained, or had offers of, employment for the winter at your regular line of business or occupation?"

To which question the witness answered that he could have obtained employment from the Boston Steamship Company, as chief engineer, at one hundred fifty to two hundred dollars a month, with board; that he was not able to obtain such employment for the winter after he returned from Alaksa, for the reason that he could not *not* take a position, only temporarily, and they do not give such a position without one takes a position of permanency;

that he could not get such a position that winter; and that he was not employed that winter.

5. The Court erred in overruling defendants' objection to the following question asked plaintiff upon the trial:

"Q. Now, in the winter of 1908 and 1909 and the spring of 1909, state what arrangements, if any, you made with the Fairhaven Water Company to work the ground, could you have obtained possession of it?"

To which question the witness answered that he had arranged with that company to work the ground on a royalty of forty per cent, with hydraulic elevators; that the company had a supply of water, ditches, pipe-lines, in such manner that it could have worked the ground; that in the summer of 1910 the company worked the ground and mined and paid a royalty of forty per cent upon \$36,358.35, and in 1911 mined and paid royalty upon over \$70,000.00.

6. That the Court erred in overruling defendant's objection to the following question asked the plaintiff upon the trial:

"Q. For what purpose were you remaining in that winter?"

In answer to which question the witness stated that he remained to get possession of the ground; that could he have got possession during that winter of 1908-9 he could have mined it by the drifting process; that he believed that the ground could be mined by that process at a profit.

7. That the Court erred in denying defendant's

motion to strike out the foregoing testimony of the plaintiff. [54]

8. The Court erred in instructing the jury, against defendant's objection, as follows:

"In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony that you should allow him any, you will allow him for the time during which he was kept out of the possession of the property he could have been profitably employed in working the property."

9. The Court erred in instructing the jury, against defendant's objection, as follows:

"You may then allow him such damages as he could have earned at his profession or trade, whatever you may call it, less any amount that he may have earned in the meantime, for the time that he was kept out of possession."

10. The Court erred in instructing the jury, against defendant's objection, as follows:

"If you find from the evidence that he purchased a boiler . . . for working this property, and that he was unable to employ his machinery in that capacity or rent it or use it in any other way, he would then be entitled to interest on the money invested in that machinery during the time that he was kept out of the possession by reason of the wrongful act of the defendants."

11. The Court erred in instructing the jury, against defendant's objection, as follows:

"If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 8 and 1908 and 9,

and the summers of 1908 and 1909, he would be entitled to legal interest at the rate of 8 per cent per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money."

12. The Court erred in giving and entering judgment for the plaintiff.

13. The Court erred in giving and entering judgment for the [55] *the* plaintiff and against the defendant for the sum of \$6,750.00 and costs.

Wherefore said defendant prays that the said judgment be reversed and set aside.

F. E. FULLER,
Attorney for Defendant.

Order Allowing Writ of Error, etc.

Upon the foregoing Petition and Assignment of Errors, it is ordered that a writ of error be, and the same hereby is, allowed as prayed for; defendant to give bond for costs in the sum of \$250.00.

Dated October 25, 1911.

CORNELIUS D. MURANE,
District Judge.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Petition for Writ of Error and Assignment of Errors and Order Allowing Writ. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 25, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. F. E. Fuller, Attorney for Defts. Dashley & Cavanagh. [56]

*In the District Court for the District of Alaska,
Second Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, C. Hoogendorn and H. Greenberg, residents within the District of Alaska, are held and firmly bound unto the above-named Otto Daniel in the full sum of Two Hundred and Fifty Dollars, to be paid to the said Otto Daniel, his executors or administrators, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 18th day of October, 1911.

Whereas, the above-named D. Hoogendorn has sued out a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made and entered in the above-entitled action by the said District Court for the District of Alaska, Second Division.

Now, therefore, the condition of this obligation is such that if the above-named D. Hoogendorn shall prosecute said writ to effect and shall answer all damages and costs if he shall fail to make his plea good,

then this obligation shall be void; otherwise to remain in full force and virtue.

C. HOOGENDORN. [Seal]

H. GREENBERG. [Seal] [57]

District of Alaska,
Second Division,—ss.

C. Hoogendorn and H. Greenberg, the sureties named in the foregoing obligation, being duly sworn, each for himself says that he is a resident within the District of Alaska, and that he is worth the sum of five hundred dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

C. HOOGENDORN. [Seal]

H. GREENBERG. [Seal]

Subscribed and sworn to before me this 18th day of October, 1911.

[Notarial Seal] F. E. FULLER,

Notary Public in and for the District of Alaska.

The foregoing bond taken and approved this 25th day of October, 1911.

CORNELIUS D. MURANE,
District Judge.

[Endorsed]: 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Bond on Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 25, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. F. E. Fuller, Attorney for Deft. [58]

District Court, District of Alaska, Second Division,
No. 2207.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Praecipe [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will please prepare and certify to the U. S. Circuit Court of Appeals for the 9th Circuit, pursuant to writ of error allowed, a transcript of the record herein, including Summons, Complaint, Motion to Strike from Complaint and Order Denying Same, Answer, Bill of Exceptions, Judgment, Petition for Writ of Error, Assignment of Errors, and Order Allowing Writ, Bond, Writ of Error, and Citation.

F. E. FULLER,
Atty. for Deft.

[Endorsed]: Cause No. 2207. District Court, District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Praecipe. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 25, 1911. John Sundback, Clerk. By ——, Deputy. [59]

[Certificate of Clerk U. S. District Court to
Transcript, etc.]

*In the District Court for the District of Alaska,
Second Division.*

No. 2207.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 59, both inclusive, are a true and exact transcript of the Summons, Complaint, Motion to Strike from Complaint and Order Denying Same, Answer, Verdict, Judgment, Bill of Exceptions and Order Allowing Same, Petition for Writ of Error, Assignment of Errors and Order Allowing Writ of Error, Bond on Writ of Error and Praecept for Transcript of Record in the case of Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant, No. 2207, this court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Writ of Error and Original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript \$23.70, paid by F. E. Fuller, Attorney for Defendant.

In witness whereof, I have hereunto set my hand

and affixed the seal of said Court this 28th day of October, A. D. 1911.

[Seal]

J. SUNDBACK,
Clerk. [60]

Writ of Error [Original].**UNITED STATES OF AMERICA,—ss.**

The President of the United States to the Honorable the Judge of the District Court for the District of Alaska, Second Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Otto Daniel, plaintiff, and D. Hoogendorn, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears;

We, being willing that error, if any hath been should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given; that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, on the 23d day of November, 1911, in the said Circuit Court of Appeals to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and ac-

cording to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 25 day of October, 1911.

Attest my hand and the seal of said District Court for the District of Alaska, Second Division, this 25th day of October, 1911.

[Seal] J. SUNDBACK,
Clerk of District Court, District of Alaska, Second
Division.

Allowed October 25, 1911.

CORNELIUS D. MURANE,
District Judge. [61]

Due service of the within Writ and receipt of copy thereof is hereby admitted this 25th day of October, 1911.

IRA D. ORTON,
Attorney for Defendant in Error.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Writ of Error. [62]

Citation [Original].

The President of the United States to Otto Daniel,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, on the 23d day of Novem-

ber, 1911, pursuant to a writ of error filed in the Clerk's office of the District Court for the District of Alaska, Second Division, wherein D. Hoogendorn is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 25 day of October, 1911.

CORNELIUS D. MURANE,
District Judge for the District of Alaska, Second
Division.

[Seal] Attest: J. SUNDBACK,
Clerk. [63]

Due service of the within Citation, at Nome, Alaska, this 25th day of October, 1911, is hereby acknowledged.

IRA D. ORTON,
Attorney for Defendant in Error.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Citation. [64]

[Endorsed]: No. 2075. United States Circuit Court of Appeals for the Ninth Circuit. D. Hoogendorn, Plaintiff in Error, vs. Otto Daniel, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

Received November 10, 1911.

F. D. MONCKTON,
Clerk.

Filed November 22, 1911.

FRANK D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

IN THE
**United States
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

D. HOOGENDORN,
Plaintiff in Error,
vs. }
OTTO DANIEL,
Defendant in Error. }
No. 2075.

*Error to the District Court for the District of Alaska,
Second Division.*

Brief of Plaintiff in Error

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In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

D. HOOGENDORN,
Plaintiff in Error, }
vs. No. 2075.

OTTO DANIEL,
Defendant in Error. }

*Error to the District Court for the District of Alaska,
Second Division.*

Brief of Plaintiff in Error

STATEMENT.

This action was brought by Otto Daniel, the defendant in error, to recover from D. Hoogendorn, the plaintiff in error, damages alleged to have been sustained by reason of failure to convey two placer mining claims which Hoogendorn had entered into a written contract to convey to Fred Ruhl, Henry Ruhl and Harry Ruhl for the sum of \$3,500, which contract had been assigned by them to Daniel. The

complaint sets out in full a deed from the Ruhls to Hoogendorn, the contract to reconvey, the assignment thereof to Daniel, and the decree in an action by Daniel against Hoogendorn for specific performance of the contract. The items of damage claimed are:

1. \$1,500.00, for expenses paid and time lost in going from Portland, Oregon, to Alaska, in September, 1907, to make payment for and perfect title to the claims under the option to purchase, and for expenses and time in returning to the States after failure to obtain possession of the mining claims.
2. \$1,500.00, on account of failure to secure employment as marine engineer during the winter of 1907 and 1908.
3. \$150.00, for loss on sale of a boiler purchased for use on the mining claims.
4. \$1,000.00, for loss of time and expenses during the pendency of the suit for specific performance and the appeal.
5. \$30,000.00, for being prevented from using and occupying the mining claims and extracting the gold therefrom, from September 13, 1907, to June 26, 1910, i. e., from the time it is alleged con-

veyance of the mining claims should have been made, until the time that Daniel went into possession thereof after the filing of the mandate in the former case. Included in this item are the same damages claimed in the action against the sureties on the appeal bond now pending upon writ of error in this court. (*Dashley et al. v. Daniel*, No. 2074.)

A motion to strike from the complaint the allegations concerning the prior action, and all the allegations of damage, except in regard to the last mentioned item, was denied by the court, after which answer was made, trial had before a jury, and a verdict returned against plaintiff in error for \$10,275.00. From this verdict, on motion for new trial, \$3,525.00 was remitted, and judgment was thereupon entered for \$6,750.00 and costs, and this writ of error sued out. Error in the order of the court refusing to strike immaterial matter from the complaint, in the admission of incompetent evidence upon the trial, and in the instructions of the court upon the evidence as to the measure of damages, is assigned as follows:

SPECIFICATION OF ERRORS.

1. The court erred, by its order made December 3, 1910, denying defendant's motion to strike from plaintiff's complaint paragraphs 5 to 10, inclusive.

2. The court erred, by its order made December 3, 1910, denying defendant's motion to strike from plaintiff's complaint that part of paragraph numbered 12 from the beginning thereof to and including the figures "1,000" in line 22, page 8, as follows:

"That the said plaintiff in the month of July, 1907, was residing at Deering, Alaska, and in said month of July, 1907, left for the States, but that he intended to accept a position as marine engineer then promised him at a salary of \$200.00 a month; that on arriving in the City of Seattle on or about the 15th day of July, 1907, the plaintiff entered into negotiations with the Ruhls, parties to said contracts, Exhibits "A" and "B" of this complaint, and afterwards purchased the interest of said Ruhls in the said placer claims Nos. 7 and 8 below Hammum as hereinbefore alleged, and thereupon plaintiff in the month of September, 1907, returned to Alaska for the purpose of perfecting his title to said claims in accordance with said contracts, Exhibits "A" and "B", and of remaining during the winter and mining said claims by the drifting process; that on the refusal of defendant to convey said property to plaintiff and to surrender possession of the same to him, plaintiff was compelled to return to the States, and he was thereby, by reason

of money spent in paying his expenses in coming to Alaska and returning to the States, and for the time wasted, damaged in the sum of \$1,500.00; that in the meantime the position which was to be filled by plaintiff, and which had been promised to him had been filled by another person and the plaintiff was unable during all the winter of 1907 and 1908 to obtain employment, and by reason thereof was damaged in the further sum of \$1,500.00; that in the month of August, 1907, for the purpose of mining and operating on said claim plaintiff purchased a boiler, and by reason of the acts and conduct of the defendants in refusing to convey said property to him or to surrender possession to him plaintiff had no use for said boiler and was compelled to make disposition of the same at a loss of over \$150.00, and was thereby damaged in said sum of \$150.00; that in the summer of 1908 plaintiff came to the District of Alaska for the purpose of trying said case of *Otto Daniel, Plaintiff, vs. D. Hoogen-dorn et al., Defendants*, hereinbefore set forth; that owing to the said case not being reached for trial until after the close of navigation, plaintiff remained in Alaska during the winter of 1908 and 1909 fully expecting to get possession of said claims for the purpose of working and operating same, and by reason of the acts and conduct of the said defendant after the trial and judgment obtained in the District Court, District of Alaska, Second Division, in appealing said case and giving said supersedeas bond and preventing the plaintiff from obtaining possession of said claim as set forth, was further damaged by the loss of employment and expenses during the fall, winter and spring of the years 1908 and 1909 in the further sum of \$1,000."

3. The court erred in overruling defendant's objection to the following question asked the plain-

tiff upon the trial:

"Q. At that time had you made any preparations for mining that property, in the way of purchasing any mining machinery, supplies and so forth?"

In answer to which question the witness stated that previous to returning to Nome, for the purpose of mining this property, he had bought a boiler in Tacoma, shipped it to Deering; that he paid three hundred dollars for the boiler; that the price was reasonable; and that he was not able to use the boiler in operating the claim that winter. (Tr. 33-34.)

4. The court erred in overruling defendant's objection to the following question asked the plaintiff upon the trial:

"Q. Now, prior to your coming to Alaska for the purpose of redeeming this property you purchased from Mr. Hoogendorn, as you have testified, to work that winter, state whether or not you could have obtained, or had offers of, employment for the winter at your regular line of business or occupation?"

To which question the witness answered that he could have obtained employment from the Boston Steamship Company, as chief engineer, at one hundred fifty to two hundred dollars a month, with board; that he was not able to obtain such employ-

ment for the winter after he returned from Alaska, for the reason that he could not take a position only temporarily, and they do not give such a position without one takes a position of permanency; that he could not get such a position that winter; and that he was not employed that winter. (Tr. 34-35.)

5. The court erred in overruling defendant's objection to the following question asked plaintiff upon the trial:

"Q. Now, in the winter of 1908 and 1909 and the spring of 1909, state what arrangements, if any, you made with the Fairhaven Water Company to work the ground, could you have obtained possession of it?"

To which question the witness answered that he had arranged with that company to work the ground on a royalty of forty per cent., with hydraulic elevators; that the company had a supply of water, ditches, pipe-lines, in such manner that it could have worked the ground; that in the summer of 1910 the company worked upon the ground and mined and paid a royalty of forty per cent. upon \$36,358.35, and in 1911 mined and paid royalty upon over \$70,000. (Tr. 36-39.)

6. That the court erred in overruling defendant's objection to the following question asked the plaintiff upon the trial:

"Q. For what purpose were you remaining in that winter?"

In answer to which question the witness stated that he remained to get possession of the ground; that could he have got possession during that winter of 1908-9 he could have mined it by the drifting process; that he believed that the ground could be mined by that process at a profit. (Tr. 37.)

7. That the court erred in denying defendant's motion to strike out the foregoing testimony of the plaintiff. (Tr. 43.)

8. The court erred in instructing the jury, against defendant's objection, as follows:

"In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony that you should allow him any, you will allow him for the time during which he was kept out of the possession of the property he could have been profitably employed in working the property." (Tr. 47.)

9. The court erred in instructing the jury, against defendant's objection, as follows:

"You may then allow him such damages as he could have earned at his profession or trade, whatever you may call it, less any amount that he may

have earned in the meantime, for the time that he was kept out of possession." (Tr. 47.)

10. The court erred in instructing the jury, against defendant's objection, as follows:

"If you find from the evidence that he purchased a boiler * * * for working this property, and that he was unable to employ his machinery in that capacity or rent it or use it in any other way, he would then be entitled to interest on the money invested in that machinery during the time that he was kept out of the possession by reason of the wrongful act of the defendants." (Tr. 48.)

11. The court erred in instructing the jury, against defendant's objection, as follows:

"If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 8 and 1908 and 9, and the summers of 1908 and 1909, he would be entitled to legal interest at the rate of 8 per cent. per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money." (Tr. 48-49.)

12. The court erred in giving and entering judgment for the plaintiff.

13. The court erred in giving and entering judgment for the plaintiff and against the defendant for the sum of \$6,750.00 and costs.

ARGUMENT.

I.

The first specification of error is for the refusal of the court to strike from the complaint paragraphs from 5 to 10, wherein are set forth the proceedings and pleadings in the former suit for specific performance of the optional contract. While an erroneous ruling on such motion may not in all cases be reversible error, it is such whenever it plainly appears that the ruling might be injurious to the opposite party.

To set forth all of plaintiff's cause of action nothing more was necessary than allegations of the execution of the contract to sell, the assignment thereof to Daniel, the breach of the contract by Hoogendorn, and the damages sustained by Daniel by reason of the breach. The remainder of the complaint is surplusage. Had Hoogendorn denied the contract, it might have been proper to plead in reply, as matter of estoppel, the judgment in the former suit. But the proceedings in that action were no part of the case in chief. Such allegations and the evidence given to support them, although the allegations had not been denied, brought a large

amount of immaterial matter before the jury which must have been prejudicial to plaintiff in error; and must have given them the impression that he wrongfully and without excuse attempted to avoid the obligations of his contract, and that both the District and the Appellate Court had so decided. It was in effect getting before the jury Daniel's side of the former case without the grounds on which Hoogendorn had contested it, and as the jury had the pleadings and the exhibits annexed thereto with them while deliberating, the amount of their verdict was undoubtedly thereby greatly affected.

The motive for breach of contract is immaterial.

Globe Refining Co. v. Landa Cotton Oil Co.,
190 U. S. 547.

Grand Tower Co. v. Phillips, 23 Wall. 471.
2 Sedgwick on Damages (8th Ed.), Sec. 603.

II.

Error in refusing to strike from the complaint the allegations of certain items of damage will be considered later in connection with the assignments of error in the admission of evidence and instructions given to the jury. It is contended that the

complaint itself plainly shows that such items of damage were not the necessary or proximate results of the breach of contract.

For the first item of \$1,500, for expenses and time of going from Portland to Alaska and returning to the States in the summer and fall of 1907, Hoogendorn clearly was not responsible. The trip to Alaska was made before Hoogendorn had any notice of a contract relation with Daniel. There would be as much reason to hold him liable because the Ruhls failed to remain on the ground so that Daniel could deal with them without expense, as to hold him for this trip. Nor did Hoogendorn have anything to do with Daniel's returning to the States in the fall of 1907. His refusal to convey the property and surrender possession certainly did not "compel" Daniel to make a trip away from Alaska. Daniel could as well say that it compelled him to take a trip around the world, had his inclination at that time led him in that direction. And no reason appears why Alaska was not as habitable then as it was later or is now.

Nor was Hoogendorn in any way responsible for the next item of \$1,500, claimed because of Daniel's failure to obtain employment during all

the winter of 1907 and 8; nor because the Boston Steamship Company did not keep a position as chief engineer at \$150 to \$200 per month open for Daniel; nor because Daniel could take a position only temporarily; nor because the company would not give him a position unless he took it permanently. (Tr. 34-35.)

The fourth item of \$1,000 for damages for loss of employment and expenses during the fall, winter and spring of 1908 and 9 is of course clearly a claim for wages and expenses during the pendency of the former suit. (Tr. 37.)

There is no rule of law by which a party can hold an adversary for loss or value of time expended in looking after litigation.

Barratt v. Grimes, 63 Pac. 273.

The Stanley Dollar, 160 Fed. 914.

13 Cyc. 79.

A separate action cannot be maintained for the expenses of a former suit.

Lovell v. House of Good Shepherd, 44 Pac. 254.

Canter v. Am. & O. Ins. Co., 3 Pet. 307.

Day v. Woodworth, 13 How. 363.

1 *Sutherland on Damages* (2nd Ed.), p. 5,
Sec. 3.

13 Cyc. 81.

In *Osborne v. Moore*, 12 La. Ann. 714, where the court refused damages claimed for traveling expenses and loss of time in preparing defense and attending court, it is said:

"The very nature of judicial proceedings presupposes that suitors will be put to some trouble in defending and prosecuting suits, but as a general rule these damages are, in the eye of the law, supposed to be covered by the taxed costs. It is desirable that courts of justice should be open to all men, and that suitors should not be deterred from pursuing their rights through fear that they should be compelled to pay for the *loss of time of their adversary*, nor from using in good faith the process of the court, and the means of redress prescribed by law, through apprehensions that they should be mulct in vindictive damages if from any unforeseen cause they should fail in their action."

And in *Nixon v. Cutting Fruit Packing Co.* (Mont.), 42 Pae. 108, held that where defendant in good faith defended an action for the salary of an employe he could not be compelled to pay interest for any vexatious delay.

Assignments 3 and 10 are as to the evidence and instructions concerning damages in connection with a boiler alleged to have been purchased for use in mining the property. There was no allegation in the complaint nor any evidence introduced upon which the instructions given could have been

based, even if such loss were a proper element of damages. The complaint alleges that Daniel had no use for the boiler and disposed of it at a loss of \$150 (Tr. 9), while the testimony was that he was not able to use it that winter (Tr. 33); and there was no evidence of what disposition he did make of it, or of what value the use for that winter could have been.

Damages for being prevented from working a mine cannot be measured by the losses on machinery bought for its operation.

Dalton v. Moore, 141 Fed. 311.

III.

Specifications 3 to 11 are directed to what are considered the erroneous admission of incompetent evidence, and erroneous instructions concerning recoverable damages and the measure of damages. This is simply an action for breach of a contract to convey real property, and the measure of damages usually applicable in such actions is thus stated:

“Ordinarily where the vendor keeps the vendee out of possession, or refuses to surrender the land, or to deliver possession, especially after the purchase price has been paid, he is chargeable with the rents; or the rents and profits; or the rental value of the land; or the value for its use; or such value where it exceeds the rents and profits; or the value

of the crops. But the vendee cannot recover both the rents and profits, and the value of the use of the land."

3 Joyce on Damages, Sec. 1754.

Where the rents and profits are less than the interest on the purchase price, such interest is not recoverable, but only the rents and profits.

Crockett v. May (Kans.), 18 Pac. 905.

Such a rule, however, is not applicable in the case of sale of a mine or mining property; except, perhaps, where the mine has been operated for some length of time and the ore is of uniform value, so that the returns may be calculated with reasonable certainty. Mining property has no rental value in the usual meaning of that term. It can only be used by taking away part of the property itself, and the only profits realizable are from converting the ore or mineral deposits into merchantable metal. In a well-considered case which has long been taken as established law on this subject, the New York Court of Appeals has held that, inasmuch as such damages cannot be estimated by rental value or the value of rents and profits, it is proper to fix them by allowing interest on the amount paid on the purchase price during the time the vendee has been kept out of possession.

Worrall v. Munn, 38 N. Y. 137.

2 *Sutherland on Damages* (2nd Ed.), Sec. 588, p. 1303.

In the case at bar there is no evidence of profits from the working of the claims prior to the breach of contract. Daniel says he had seen them worked, but only by the process of winter mining,—that is, by drifting and taking out a dump in the winter, and sluicing it up in the summer (Tr. 32); that if he had had the claims during the winter of 1907 and 8, he *believes* that he could have worked them at a profit (Tr. 40); and that he could have worked and mined the ground by the drifting process during the winter of 1908 and 9 (Tr. 36-37). This is an entirely different method of mining from the hydraulicking method subsequently employed, and results from one method furnish no basis whatever for estimating results from the other.

There is no evidence of what the profits of such mining by the drifting process would have been, and this is the only method by which Daniel claims he intended to work the claims from the fall of 1907 until the summer of 1909. Yet the court instructed the jury that, if they found Daniel could have worked the claims at a profit during the periods mentioned, he would be entitled to interest on such

profit (Tr. 45). There is absolutely no evidence to which the instruction is applicable. It unauthorizedly directed the jury to find that there would be a profit from such method of mining, and then to draw on their imagination in fixing the amount of profit.

Neither is there any evidence whatever that Daniel could or intended to work the ground in the summer of 1908. Yet the court's instruction (Tr. 45) authorized the jury to find that he could have worked the claims at a profit during that summer.

As to the summer of 1909, the testimony is of a lease to the Fairhaven Water Co., at a royalty of 40 per cent. The amount of profit to Daniel which would have resulted therefrom was attempted to be shown by evidence of the production in the summers of 1910 and 1911, during one of which years the total output was \$36,000, and during the other \$70,000.

There is no evidence that the paystreak which was then worked was known to exist prior to the breach of the contract, or at any time prior to the actual working in 1910. Nor was there any evidence that the mining was intended to be done in the same place in 1909 as in 1910 or 1911.

The rate of royalty was agreed upon by Daniel and one McLeod. It appeared in the former suit that McLeod was interested in the purchase of the property with Daniel, both then being employes and agents of the Fairhaven Water Co., which had furnished the money for the purchase price, and both being employes of that company at the time the alleged lease or agreement was made. There is no evidence that the royalty stated was reasonable, or that Daniel could have made any profit by mining in any other way than under this alleged lease. No written lease nor any books of account were given in evidence.

Daniel says that he knew approximately the expense of operation for 1911 (Tr. 41), which was about twenty thousand dollars, though he could not tell the amount of the different items. That in the items of expense he included labor, cost of maintenance of the ditch and supplies, but could not say that any allowance was made for the use of water (Tr. 42). It seems that the company operated nowhere else than on these claims during the summers of 1910 and 1911. If the witness had added to his items of expense an allowance for the use of the water, or, what is equivalent thereto, interest on the eight hundred thousand-dollar investment, in the

ditch, and the expense of the company's management, it would be evident that the operation was not profitable for the Fairhaven Water Co., the alleged lessee, and that the claims really were not worked at a profit.

In a case where it was attempted to fix the amount of expected profits in a similar way, the Circuit Court of Appeals for the Eighth Circuit says:

"Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages." * * * "Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way."

Central Coal & Coke Co., v. Hartman, 111 Fed. 96.

"A person can only be held responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract."

Globe Refining Co. v. Landa Cotton Oil Co.,
190 U. S. 540.

Howard v. Stillwell & B. Co., 139 U. S. 199.

Winslow v. Hoffman, 69 Atl. 894; 17 L. R. A. (N. S.) 1130, note.

The A. Denicke, 139 Fed. 645.

Hunt v. Oregon P. Co., 36 Fed. 481.

Damages recoverable for the breach of a contract must be the direct and natural consequence of the breach; not remote, speculative, or contingent, but such as could have been foreseen and estimated with reasonable certainty.

Western Union Tel. Co. v. Hall, 124 U. S. 444.

Eckington & S. H. R. Co. v. McDevitt, 191 U. S. 103.

Kelly v. Fahrney, 97 Fed. 176.

Central Trust Co. v. Clark, 92 Fed. 293.

Gayton v. Day, 178 Fed. 249.

Of this subject, the text of *Cyc.* (Vol. 13, p. 25) has to say:

“While it is the object of the law to compensate a party for all damages which may result to him from the injury complained of, yet where such injuries are remote, contingent, or speculative, and do not directly follow from the injury or breach, they will be denied. A rule of damages which embraces within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service

would be a serious hindrance to the operations of commerce and to the transaction of the common business of life."

Damages for the breach of a contract preventing the carrying on of a business not yet in operation are too speculative to be allowed.

Standard Oil Co. v. Carter, 62 S. E. 150; 19 L. R. A. (N. S.) 155, and note.

Before such profits can be allowed, there must be proof of the profits before, as well as during the time of interruption.

Taber Lumber Co. v. O'Neal, 160 Fed. 602.

Royalties on amounts which might have been mined are purely conjectural, and damages cannot be fixed on such basis.

Coosaw Mining Co. v. Carolina Mining Co., 75 Fed. 861.

Liability for damages for breach of contract is not affected by collateral ventures, and profits on a contract with a third party are not recoverable.

1 *Sutherland on Damages* (2nd Ed.), Sec. 47.

Hunt v. Oregon P. Co., 36 Fed. 481.

Deelvin v. New York, 63 N. Y. 8; 53 L. R. A., note, pp. 42, 45, 99.

Wallace v. Ah Sam, 71 Cal. 197.

The amount of damages recoverable cannot be

fixed by the plaintiff's agreement with third parties.

Dettering v. Nordstrom, 148 Fed. 84.

The A. Denicke, 138 Fed. 645.

Those profits are usually considered too remote, among many others, which are not the immediate fruits of the principal contract, but are dependent upon collateral engagements and enterprises, not brought to the notice of the contracting parties, and not, therefore, within their contemplation or that of the law.

Bell v. Reynolds, 78 Ala. 515; 56 Am. Rep. 52.

Under the authorities cited, the alleged items of damage are not only speculative and uncertain, but none of them is the direct or necessary consequence of the alleged breach of contract. None of them could have been within the contemplation of the parties to the contract at the time of its execution. The Ruhls could not add to Hoogendorn's liabilities by assigning the contract, for the obligations under the contract became fixed at the time the contract was made. The theory of the evidence, however, was that the amount of damages could be determined by the vagaries of the assignee, and by the operations of the lessee of the assignee, of one of the parties to the contract.

If this theory were correct, instead of complaining of the judgment, plaintiff in error should consider himself fortunate that the Ruhls were found in Portland and not in South Africa; that the option was assigned to a marine engineer whose usual salary was from one hundred fifty to two hundred dollars a month, instead of a mining engineer commanding a salary of ten thousand dollars a month, who might have seen fit to travel to Alaska in his private yacht and to take along a three hundred thousand dollar dredge instead of a three hundred dollar boiler; and still more fortunate that a million-dollar paystreak was not discovered before the trial below. It is needless to speculate as to the amount for which he might have been mulcted.

Had the claims been conveyed by warranty deed, and the purchase price paid, only \$3,540 and interest could have been recovered by Daniel if title had completely failed and he had *never* got into possession. Here he had the ground, with every ounce of gold in it still untouched. Yet because of two years' delay in getting possession, consumed by the operation of that legal machinery which it is the right of every litigant to invoke, the jury found that he had been damaged three times, and the court

twice, the amount of the purchase price. It seems scarcely possible that the law allows so much greater damages for the lesser injury.

IV.

After delivery to the jury of the instruction relating to the boiler, specified as error under assignment 10, a colloquy occurred between the *nisi prius* judge and counsel for defendant in error (Tr. 46), which resulted in a further instruction by the trial court to the jury (Tr. 46-47) as follows:

"I will instruct you, gentlemen of the jury, that the only kind of machinery which is claimed for was a boiler, and in arriving at your verdict you will take into consideration the fact, if you so find from the testimony, that plaintiff purchased a boiler and moved it onto the claims, and the same method should be employed in computing the damages in this case, if you should find said boiler was purchased, and that the plaintiff was prevented from using the same, *for the price of such boiler.*"

No error seems to have been assigned upon this instruction, and we are therefore precluded from relying upon the manifest error it contains in charging the jury to find damages for *the price of the boiler*, although that the boiler was retained by Daniel and never left his possession is nowhere in dispute. We point out this inconsistent and erroneous instruction in order to permit this court to

exercise its unquestioned power to regard the error of its own motion. Both rule 11 and rule 24 (par. 4) of this court provide that "the court may at its option notice a plain error not assigned."

V.

Besides the foregoing objections to the different alleged items of damage, it is also contended that triple damages were claimed and allowed for the same alleged loss. Daniel certainly is not entitled to be placed in any better position than that in which he would have been had there been no breach of contract. Had he obtained possession of the claims in September, 1907, and begun mining them, his time thereafter would have been occupied with such mining, and his compensation therefor must have come from the profits of such mining, if any. But he also claims, in addition to damages for loss of profits through not mining the claims, damages on account of loss of time, and damages on account of wages he was prevented from earning, during the same period. This is clear, both from the complaint (Tr. 8-9) and from the court's instructions. (Tr. 44.)

That the alleged damages could not be ascertained from the evidence in this case with any reasonable definiteness or accuracy seems evident from

the difference in the amounts found by the jury and by the court, and by the different amount found in the action against the sureties in the action against them.

It is impossible, of course, to say upon what evidence the jury based its verdict. If any incompetent evidence of damages was admitted, or if any improper elements of damage were considered in arriving at the amount of the verdict, this was not cured by the reduction of the verdict by the court. A verdict founded in part upon incompetent evidence cannot be corrected by the court's requiring a remittitur of the amount of the item to which the incompetent evidence related.

Jayne v. Loder, 149 Fed. 21; 7 L. R. A. (N. S.) 984.

It is submitted that the judgment of the District Court should be reversed and a new trial granted.

Respectfully submitted,

F. E. FULLER,
J. W. ALBRIGHT,
Attorneys for Plaintiff in Error.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

D. HOOGENDORN,
Plaintiff in Error,
vs.
OTTO DANIEL,
Defendant in Error.

} No. 2075

BRIEF OF DEFENDANT IN ERROR

**UPON MOTION TO DISMISS WRIT OF
ERROR.**

The judgment of which the plaintiff in error complains has been duly and fully satisfied by the authorized attorneys for defendant in error, as appears by the certified copy of the Judgment Docket of the United States District Court for Alaska, Second Division, and the affidavit of Ira D. Orton, Esquire, one of the attorneys for the judgment creditor, the defendant in error here, filed in this Court in

support of the motion to dismiss the writ. "The judgment being satisfied, 'has passed beyond review' for the satisfaction thereof is the last act and end of the proceeding. *Morton v Superior Court*, 65 Cal. 496; 4 Pac. Rep. 489."

People ex rel Dunn vs. Burns, 21 Pac. 540 (Cal.).

The plaintiff in error "had his remedy by motion or otherwise to vacate the satisfaction; but until set aside it is valid and the judgment itself has passed beyond review. Satisfaction is the last act and end of judicial proceedings."

Morton v. Superior Court, 4 Pac. 489.

"The exercise alone of a judicial power equal to that which made the decision, can impart this new life to a judgment which has once been satisfied by an officer or person clothed with power to make the entry. The hearing the evidence and finding the facts on the motion (to vacate the satisfaction) is as purely judicial as is the ascertaining of the amount of the indebtedness and rendering the judgment in the first place."

Hughes v. Streeter, 24 Ill. 650.

There can be no question that the satisfaction of the judgment by the attorneys for the defendant in error ended the controversy between the latter and the plaintiff in error. The Supreme Court of the United States, Federal Courts and all other Courts before whom the question has been brought, have uniformly held that an appeal would not be enter-

tained where an actual controversy between appellant and appellee had ceased to exist.

Mills vs. Green, 159 U. S. 651.

Jones v. Montague, 194 U. S. 147.

Little v. Bowers, 134 U. S. 547.

Singer Mfg. Co. v. Wright, 141 U. S. 696.

Richardson v. McChesney, 218 U. S. 487.

Tomboy Gold Mines Co. v. Brown, 74 Fed. 12.

Tinker v. McLaughlin Farrar Co., 119 Pac. 238 (Okla.).

Whyel v. Coal & Coke Co., 69 S. E. 192 (W. Va.).

Duryea v. Fuechsel, 40 N. E. 204 (N. Y.).

A reversal of the judgment would not give the plaintiff in error any effectual relief, because the amount of the judgment has been paid to the defendant in error and the judgment of the Court upon this writ of error cannot compel the return of that money.

"The duty of this Court, as of every other tribunal, is to decide actual controversies by a judgment which can be carried into effect * * * * It necessarily follows that when pending an appeal from the judgment of a lower Court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal."

Mills v. Green, 159 U. S. 651, followed in
Jones v. Montague, 194 U. S. 147.

The defendant in error was bound to satisfy the judgment against the plaintiff in error when the amount of such judgment was paid to him by or for the company which had purchased from plaintiff in error the lands or claims on which this judgment was a lien. It is clear that defendant in error was without fault.

BRIEF OF DEFENDANT IN ERROR ON THE MERITS.

This action is supplementary to a suit for specific performance brought by defendant in error against plaintiff in error to compel the conveyance of two placer claims according to contract entered into between plaintiff in error and the assignors of the defendant in error.

In the suit for specific performance a decree for the plaintiff (the defendant in error here) was affirmed by this Court in *Hoogendorn v. Daniel*, 178 Fed. 765. Shortly thereafter the defendant in error brought this action to recover the damages he sustained by reason of the failure of the plaintiff in error to convey said placer claims in accordance with said contract.

“Incidental to specific performance of a contract to convey land, if the vendor has wrongfully withheld possession, the vendee is entitled to damages for the delay.”

36 Cyc. 753-754.

That such is the law is not controverted by counsel for plaintiff in error. They contend that certain

items of damage claimed by defendant in error, which the trial Court's instruction allowed the jury to find, are not recoverable at all, or if they are, cannot be recovered in this action because they are not established by sufficient evidence.

The first item of damages claimed by defendant in error in his complaint is the sum of \$1500 representing money spent by him in going from Portland, Oregon, to Alaska for the purpose of perfecting his title to said claims in accordance with the contract or option given by plaintiff in error and in returning to the States upon the refusal of the plaintiff in error to convey and surrender the possession of said claims to the defendant in error, said claim being also for time lost in making said voyage.

The plaintiff in error contends that such item was not a proper element of damages in this action. Conceding for the purpose of argument that such damages are not recoverable, we contend that the trial Court did not commit prejudicial error in refusing to strike from the complaint the allegations relating to such damages in overruling the objections of counsel for plaintiff in error to the testimony introduced, or in refusing to strike said testimony, it is nevertheless a fact that the defendant in error introduced no evidence tending to show what amount of money he spent in going to Alaska and in returning to the States, nor did the Court instruct the jury that he was entitled to recover the expenses of his trip to Alaska. As to Daniel's claim for loss of time spent in making that trip, there is testimony to the effect

that the defendant in error could have obtained employment for the winter following that trip, at from one hundred and fifty to two hundred dollars per month, and that by reason of his trip to Alaska he was unable, after his return to the States, to obtain said employment. Conceding for the sake of argument that such testimony was incompetent, the error in admitting it and in refusing to strike it, was not prejudicial to the plaintiff in error in view of the fact that upon motion for new trial the Court reduced the verdict from \$10,275.00 to \$6,750.00 (Record pp. 29-30). This reduction of \$3,525 equals about three times the amount which the jury may have allowed the defendant in error for his loss of time and employment from the time he left Portland for Alaska in September, 1907, to the time he returned to Alaska in the spring of 1908.

“It is a good practice in a proper case to permit a plaintiff to enter a remittitur, and as so modified to affirm a judgment in his favor, which must otherwise be reversed for error occurring at the trial, but such practice can only be followed where it appears from the record that certain elements of the verdict might have been affected by the error and that the remainder of the verdict could not have been so affected.”

Syllabus, Chesbrough et al. v. Woodworth,
195 Fed. 875.

Such practice removed one of the main causes of the law's delay which, more than anything else, has contributed to the spread of dissatisfaction with judges and Courts throughout this country. If such

practice be approved, it necessarily follows that an Appellate Court should not reverse a case when the verdict of a jury has been reduced by the lower Court by an amount equal to the amount which the jury may have allowed for an element of damage erroneously submitted to their consideration, where the remainder of the verdict could not have been affected by the error. In this case, the reduction made by the Court and accepted by the defendant in error, to-wit., the sum of \$3,525, is sufficient to cover the damage which the jury may have allowed to the defendant in error for his loss of time and employment from September, 1907, to the summer of 1908, and also from the latter date to the spring of 1909, even though the jury assumed that the defendant in error would have been employed continuously during all these times at the rate of \$175.00 a month. Under his own testimony the defendant in error could not have been allowed any greater compensation for his lost time from September, 1907, to the spring of 1909.

We think that this argument disposes of the first item of \$1,500; of the second item of \$1,500 (Daniel's failure to get employment during the winter of 1907-8) and of the item of \$1,000 for loss of employment and expenses during the fall, winter and spring of 1908-1909.

As to the \$150.00 claimed by the defendant in error for the loss on the sale of the boiler, which he had purchased for use on the mining claims and which he could not use by reason of the refusal of plaintiff in error to convey the said claims, the

Court, it is true, refused to strike from the complaint the allegation relating to said claim and the defendant in error introduced evidence showing that he bought a boiler for the purpose of working said claims, paid \$300.00 for it and was not able to use it. It is also true that the Court in instructing the jury used language which standing alone might have conveyed to the jury the impression that the defendant in error could recover the price of said boiler. The sentence in which such language is found (Record pp. 46-47) is grammatically incomplete, and *no exception was taken to the same.* The Court evidently did not intend to tell the jury that the plaintiff was entitled to recover the price of the boiler. He has just told them that the plaintiff would "be entitled to interest on the money invested in that machinery during the time that he was kept out of the possession (of the mining claims) by reason of the wrongful act of the defendants" (Record p. 45). By the instruction in which the language above referred to was used, the Court meant that the jury could take into consideration the price of the boiler in arriving at their verdict for the amount of damages which the plaintiff was entitled to recover by reason of being unable to use said boiler. It is fair to assume that jurors of ordinary intelligence could not have been misled by the Court's instruction which, as a matter of fact, was meaningless and in itself insufficient to convey the idea that the plaintiff could recover the price of the boiler. In any event, if the Court should conclude that the language was erro-

neous, it may redress any wrong which plaintiff in error may have suffered by reason of the inadvertence of the trial Court, by ordering a remittitur of \$150.00.

We come now to the damages claimed by defendant in error by reason of being deprived of the possession of the mining claims and thus prevented from mining and extracting the placer gold and other minerals contained therein until the 27th day of June, 1910 (almost three years). The Court instructed the jury as follows: "If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 1908, and 1908 and 1909, and the summers of 1908-1909, he would be entitled to legal interest at the rate of eight per cent. per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money." (Record p. 45.) Counsel for plaintiff in error do not seem to contend that this instruction is erroneous, but they contend that the evidence is insufficient to show that the defendant in error would have worked and mined the ground at a profit during the winters of 1907-8 and 1908-9; that there is no evidence of what the profits of such mining would have been; that there is no evidence that Daniel could or intended to work the ground in the summer of 1908; that the profits which would have resulted to Daniel during the summer of 1909 from his royalty under the lease to the Fairhaven Water Co. were not proved by competent or satisfactory evidence.

Daniel testified that during the winters of 1907-8 and 1908-9 he could have worked the property by drifting process if he had had the possession of it. (Record pp. 3 to 37-38, 40.) He also testified that from his knowledge of the ground and the conditions existing in the country in 1907 and 1908, these claims would have been mined at a profit by drifting process. (Record p. 40.) Daniel's testimony on these points is the only testimony in the case. It stands uncontroverted and unimpeached. The evidence further shows that during the summer of 1910, after Daniel had obtained possession of the property, the Fairhaven Water Co. worked the ground under lease from Daniel, and took out of part of one claim (two pits two hundred feet square on No. 7) a little over Thirty-six thousand, three hundred and fifty dollars, forty per cent. of which was paid to Daniel as his royalty. (Record pp. 38-39.) During the summer of 1911 the same company under same lease took out over Seventy thousand dollars, of that *gross* amount, forty per cent. was paid to Daniel. (Record p. 41.)

The evidence further shows that the defendant in error had arranged with the same company with working the claims on the same royalty, during the summer of 1909 and that said company could have so worked said claims during that time if defendant in error had had possession of the property. (Record pp. 36-37.) The gold which was taken out in 1910 and 1911 was in the ground in 1907, 1908 ~~and~~ 1909, and certainly what was taken out in 1910 and 1911 is competent evidence of what could have been

taken out in the former years. It seems to us that the contentions made by learned counsel for the plaintiff in error, in reference to the sufficiency of the evidence, the alleged remoteness and uncertainty of the damages, etc., are without merit, and the few authorities they cite inapplicable. In their contention that the defendant in error was not entitled to more than the interest on the purchase price of the claims, they overlook the fact that Daniel was entitled to the benefit of his bargain. The same must be said of their proposition that if the title had completely failed, Daniel could not have recovered more than the purchase price and interest. As they remark in their brief, the rule governing the remedies of the vendee of land is not applicable in the case of a sale of a mine or mining property.

The first specification of error, to-wit., the refusal of the Court to strike from the complaint the paragraphs wherein are set forth the proceedings and some of the pleadings in the suit for specific performance of the option given to Daniel's assignors is also without merit. The defendant in error was clearly entitled to show in this action that the plaintiff in error had breached his contract, by refusing to convey the claims which he had agreed to convey; that he, the defendant in error, was kept out of possession of the said claims until June, 1910, as a result of the refusal of the plaintiff in error to perform his contract, and of the time necessary to carry to final judgment the suit for specific performance of that contract. The proceedings and pleadings in

said suit were of no greater prejudice to plaintiff in error than testimony in regard to such proceedings would have been. He was not prevented in any way from presenting to the jury his side of the former case, the grounds upon which he contested the suit for specific performance, if indeed he had any substantial grounds upon which to contest the same.

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

W. T. DOVELL,

IRA D. ORTON,

Attorneys for Defendant in Error.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

D. HOOGENDORN,
Plaintiff in Error., }
vs. } No. 2075
OTTO DANIEL,
Defendant in Error.

*Error to the District Court for the District of
Alaska, Second Division.*

BRIEF OF PLAINTIFF IN ERROR ON
MOTION TO DISMISS AND REPLY
BRIEF ON THE MERITS.

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In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

D. HOOGENDORN,
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No. 2075

*Error to the District Court for the District of
Alaska, Second Division.*

BRIEF OF PLAINTIFF IN ERROR ON
MOTION TO DISMISS AND REPLY
BRIEF ON THE MERITS.

THE PURPORTED JUDGMENT DOCKET.

Attention is directed to the purported judgment docket, of which a certified copy is relied on by defendant in error to show satisfaction of the judgment below, containing no entry of the issuing of the writ of error herein, or of the appeal, or when

taken, in the manner required by section 532 of the Alaska Code of Civil Procedure, which reads:

"The judgment docket is a book wherein the judgments are docketed, as elsewhere provided in this code. Each page thereof shall be divided into eight columns, and headed as follows: Judgment debtors; Judgment creditors; Amount of judgment; Date of entry in journal; When docketed; *Appeal, when taken;* Decision on appeal; Satisfaction, when entered."

Failing on its face to comply with the provisions of the statute, it would seem that the instrument in question is not entitled to admission in evidence as a judgment docket, nor for any purpose for which it is sought to be used as such, and that it ought not to be so received or considered.

STATEMENT.

The judgment was paid and satisfied through the mistake of a third party. The payment was not made by the defendant, or at his request, or with his authority, or even with his knowledge or consent; and he has filed a motion in the cause below to have the money returned to the corporation that paid it (Afft. D. Hoogendorn). The instructions given by the president of that corporation, which is not a party to this writ, seem either to

have been misunderstood or erroneously communicated by telegraph, and it has brought an action against defendant in error to recover the money back (Afft. Walter W. Johnson).

ARGUMENT.

Money paid through mistake of facts can always be recovered back. Even the cases holding that an appeal will be dismissed after payment of the judgment by the defendant do not apply here, for in this case there has been no payment, voluntary or otherwise, by the defendant. Although Daniel received the money without fault on his part, he has no more right to retain it, after demand for repayment, than if he had stolen it; and he cannot make his wrongful retention of the money the basis of his motion to dismiss.

The cases in the Supreme Court of the United States are readily distinguishable. Where it is made apparent that the *dominus litis* rests in one party, or that the *successful* party below has been paid the judgment in full, that party cannot maintain the writ. But where the judgment is paid or performed by the *unsuccessful* party below, whether

prior to or after execution issued, or prior to or after the writ is sued out, he may nevertheless maintain the writ if it be sued out within the period allowed by law; and in case of reversal, he is entitled to be restored to his former rights.

"There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money."

County of Dakota vs. Glidden, 113 U. S. 222 (28 L. Ed. 982).

In *Erwin vs. Lowry*, after judgment below, certain moneys ordered paid to the unsuccessful party were deposited with the sheriff prior to writ of error. A motion to dismiss was denied in the following language:

"Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights."

Erwin vs. Lowry, 7 Howard 172; 12 Law Ed. 655.

Also see Note 33 L. Ed. U. S. Reports, 1016, citing cases where money paid by mistake can be recovered back.

"It is said that after making the deed which the court ordered, the appellant is bound by it, and cannot now prosecute this appeal. The principle is unsound."

O'Hara vs. McConnell, 93 U. S. (3 Otto 150); 23 Law. Ed. 841.

Several cases decided by the Supreme Court, dismissing appeal after payment of debt or judgment, are on the theory that the facts showed a voluntary settlement of the litigation, and that no real controversy longer existed between the parties.

Little vs. Bowers, 134 U. S. 547 (33 L. Ed. 1016);

San Mateo Co. vs. S. P. R. Co., 116 U. S. 138 (29 L. Ed. 589);

Thorp vs. Bonnifield, 177 U. S. 15 (44 L. Ed. 652).

"Although there is undoubtedly a conflict in the cases, the doctrine supported by the *great weight of authority* is that a judgment defendant does not waive the right to appeal and to reverse the judgment for error, by paying the amount thereof, either before or after taking his appeal, no matter whether the payment is made voluntarily or after execution has issued and been served upon him."

45 American State Reports, 272, note and cases cited.

"The general doctrine of the cases seems to be that, in the absence of any statute on the subject, the party against whom an entirely adverse judgment is rendered does not lose his right of appeal by paying the amount of the judgment, either before or after taking his appeal, since this is no more than the judgment-creditor could compel him to do if no stay of execution were awarded (citing cases). And compliance with a decree in equity does not deprive the party against whom it is rendered of his right to appeal (citing cases). * * * So where a bill for specific performance was dismissed, but the cause was retained for the purpose of making compensation on condition that the complainant would bring in the contract to be canceled, it was held that the complainant would not lose his right of appeal even by bringing in the agreement and filing it without protest. *River vs. Gray*, 10 Md. 282."

13 *American Decisions*, 546, note and cases cited.

The Court of Appeals of New York has very fully considered the subject in a case where a judgment of the Special Term of Common Pleas was affirmed by the General Term of that court, the judgment paid, and an appeal thereupon taken to the highest court of the state. The judgment was satisfied of record even before service of the notice of appeal. The defendant paid the judgment voluntarily, no process having been issued or proceedings taken to enforce payment thereof.

"The defendant's practice in paying the judgment before appealing from it is not to be con-

denmed. It is rather to be encouraged. * * * * * We think he should not, by a temporary submission to the decision of the court, be placed in a worse position than if he awaited execution and settled it with sheriff's fees (citing cases). To the same effect are many subsequent decisions, and it must be deemed too well settled by authority to require further discussion that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal."

Hayes vs. Nourse, 107 N. Y. 577; 1 Am. St. Rep. 89; 14 N. E. 508.

The Chief Justice of the Supreme Court of Illinois, in *Richeson vs. Ryan*, 14 Ill. 741; 56 Am. Dec. 193, entertained the same opinion:

"The judgment fixed the liability of Richeson, and he could only avoid payment by procuring its reversal. He was not bound to wait until payment should be demanded by the sheriff. He was at liberty to pay off the judgment at once and thereby prevent the accumulation of interest and costs. By so doing he did not waive his right to remove the record into this court for the purpose of having the validity of the proceedings tested and determined."

The following authorities also hold that the payment or satisfaction of a judgment is no bar to an appeal or writ of error thereon for its reversal.

Burrows vs. Mickle, 22 Fla. 572; 1 Am. St. Rep. 217;

County Commissioners vs. Johnson, 21 Fla. 577;
Armes vs. Chappell, 28 Ind. 469;
Dickensheets vs. Kaufman, 29 Ind. 154;
Hill vs. Starkweather, 30 Ind. 434;
Belton vs. Smith, 45 Ind. 291;
Kling vs. Sejour, 4 La. An. 128;
Watson vs. Kane, 30 Mich. 61;
Barthelemy vs. People, 2 Hill 248;
Perry vs. Woodbury (Com. Pl.), 17 N. Y. 530;
Edwards vs. Perkins, 7 Ore. 149;
Eilers vs. Pick (Ore.), 113 Pac. 54;
Chapman vs. Sulton, 68 Wis. 657; 32 N. W. 683.

It is well settled that a court will refuse to consider moot questions. Some of the authorities cited by defendant in error are of this class; in others, the right to vote at elections already held and to recover taxes paid after decree below, was in controversy, and there was nothing left for the decree to operate upon. Counsel seem to have found no cases in point, where the payment of an ordinary money judgment, such as that in controversy here, has prevented the *unsuccessful* party below from maintaining the writ. We shall briefly consider the authori-

ties cited, in the order in which they appear in ~~the~~ brief of defendant in error.

Morton vs. Superior Court, 65 Cal. 496 (4 Pac. 489), fine for contempt for disobeying order of injunction, in which the fine was paid.

People vs. Burns (Cal.), 21 Pac. 540, dismissed on stipulation of payment, with leave to appellant to make further showing for reinstatement of appeal before going down of the remittitur.

Hughes vs. Streeter, 24 Ill. 650, is not in point, being on motion to vacate satisfaction of judgment.

Mills vs. Green, 159 U. S. 651, was to secure the right to vote at an election for delegates to a constitutional convention. Before the appeal was taken, the date of the election had passed.

Jones vs. Montague, 194 U. S. 147, writ of prohibition to prevent canvass of votes cast at a congressional election after the canvass had been made.

Little vs. Bowers, supra, for taxes which were paid after the writ issued.

Singer Mfg. Co. vs. Wright, 141 U. S. 696, to enjoin the collection of a tax which was paid after the decree below.

Richardson vs. McChesney, 218 U. S. 487, a moot case in which the election affected by the decree was held a long time before, and both the persons elected and their successors in office had been admitted to seats.

Tomboy G. M. Co. vs. Brown, 74 Fed. 12, to set aside tax sale and enjoin making a tax deed. Pending appeal, the tax was paid.

In *Tinker vs. McLaughlin* (Okl.) 119 Pac. 239, the motion to dismiss was not resisted.

In *Whyel vs. C. & C. Co.* (W. Va.), 69 S. E. 192, it developed that a moot question only was left of the controversy.

In *Duryea vs. Fueschel* (N. Y.), 40 N. E. 204, the judgment appealed from was subsequently vacated.

The motion to dismiss should be denied.

REPLY BRIEF OF PLAINTIFF IN ERROR
ON THE MERITS.

UNRECOVERABLE DAMAGES.

It is not contended in the brief of defendant in error that any of the damages claimed (1) for loss of time and expense in going from Portland to Alaska and returning to the States in the fall of 1907, in the sum of \$1,500; (2) for the failure to secure employment during the winter of 1907-1908, in the sum of \$1,500; and (3) for the loss of time and expenses during the pendency of the suit for specific performance and the appeal, in the sum of \$1,000, are recoverable; but the errors committed in refusing to strike these items from the complaint, in overruling the objections to the testimony offered thereunder, in denying the motion to strike the testimony admitted, and in instructing the jury upon the evidence thus improperly introduced, are sought to be excused on the ground that the court below cured any prejudice by requiring the defendant in error to remit a certain amount from the verdict.

The fact that the defendant in error introduced no evidence at the trial even tending to show what he had expended under item (1) *supra* is unquali-

fiedly admitted; but it is said that the court did not instruct the jury that defendant in error was entitled to recover such expenses. If there was no such evidence, it was the duty of the court to instruct the jury to disregard the claim for expenses, and the omission to do so constitutes error prejudicial to the rights of plaintiff in error. The jury had the pleadings with them during their deliberations (Tr. 44), and were undoubtedly influenced in fixing the amount of their verdict by the allegation in the complaint which the court had refused to strike.

Nor does the record disclose that the amount remitted from the verdict by defendant in error cured any error committed by the court in making the orders and rulings, and in giving the instructions heretofore assigned as error. The record is silent whether any of the items mentioned were taken into consideration by the court in requiring the remittitur (Tr. 29). It would more readily appear that they were not considered, in view of the court's previous action in refusing all relief from the errors complained of, and that the remittitur was required in order to reduce the amount of the verdict under the instructions relating to the alleged damage of \$30,000 for Daniel's being pre-

vented from using and occupying the premises in controversy during the time he was kept out of possession (Plff's Bf. 4, item 5).

We do not believe that the court will be influenced by any appeal to decide this writ in such manner as counsel conceive would be popularly approved. May we be permitted to argue that such a suggestion does not strengthen the position of defendant in error upon the merits? Nor is it apparent why a plain disregard of the law, should the court perceive error and yet hold against the writ, would meet with more popular approval than a determination of the questions involved in accordance with the principles upon which all courts are founded, and upon which they rely to protect individuals against an unlawful invasion of rights.

No reason being shown why the alleged damage for failure to secure employment as a marine engineer during the winter of 1907-1908 is recoverable, we turn to the damage claimed for loss of time and expense during the pendency of the suit for specific performance and the appeal thereon. Attention is again directed to the well-established rule, adverted to in our opening brief (p. 15), that evidence of damage suffered through time lost or expenses in-

curred in carrying on litigation is incompetent, and recovery therefor, beyond taxed costs, impossible. Nor is the correctness of this principle questioned in the brief of defendant in error.

THE BOILER.

This item is conceded as manifest error. The suggestion of a remittitur by this court of the amount claimed for the boiler, if coupled with costs, might be of some force; but a remittitur of that amount would give no relief from the many other errors assigned. Daniel testified that he paid \$300 for the boiler. (Tr. 33), and the court instructed the jury to find for *the price of the boiler* (Tr. 47). A remittitur for \$150, as suggested by counsel, would therefore not be in order in any event.

We sympathize with counsel in their endeavor to extricate themselves from the dilemma in which the court's instruction (Tr. 47) to find for *the price of the boiler* has placed them. Our opening brief (p. 27) admitted no assignment of error thereon, and rested the court's power to regard this instruction, now concededly erroneous, upon the rules of this court.

Counsel say that "the sentence in which the language is found is grammatically incomplete," and

that "the court evidently did not *intend* to tell the jury that plaintiff was entitled to recover the price of the boiler." If the court neglected to make its instruction grammatically complete, and the effect was to misstate the law to the jury, it would appear to constitute error just as much as if the court had erroneously instructed the jury with grammatical accuracy.

Nor, of course, is the court's *intent* material. It is what the court *says*, not what it *intends* to say in instructing the jury, that influences them in their deliberations, and governs their application of the law to the facts. The language of this instruction is plain; but even if it were not, an ambiguous instruction is just as much error as an erroneous instruction. Instructions bearing on the measure of damages must be set forth clearly and intelligibly.

13 Cyc., 235.

Turning to the other instruction relating to the boiler, assigned as error under specification 10 (Tr. 48), it is probably safe to say that the true rule for estimating damages for the loss of the use of the boiler, in a case where such damages are properly recoverable, is not "interest on the money invested" in the boiler during the time its use was prevented, but the *value of the use* during that time. There

being no testimony that Daniel was unable "to rent the boiler or use it in any other way (Tr. 48)," the instruction was without any evidence to support it. Instructions must follow the evidence, and cannot direct a consideration of matters not appearing in proof.

REMOTE, SPECULATIVE AND CONTINGENT DAMAGES.

Adverting more particularly to this aspect of the writ, in its bearing on the admission of incompetent evidence and the erroneous instructions touching recoverable damage and the measure of damages, we call attention to the omission of counsel to cite any authority opposed to the conclusions announced in our opening brief (pp. 17 to 25). A discussion of the evidence is relied on to overcome their force.

Counsel are mistaken in the impression that the instruction assigned as error under specification 11 (Tr. 48-49), is not deemed erroneous in stating the rule for the measure of damages. The direction to allow interest on the *profits* instead of the *purchase price* is believed to constitute reversible error, and authorities have been cited in support (Plff's Bf. 19).

The objection to the testimony on work and values,—hearsay as some of it is, and unsatisfactory

and incompetent as the rest of it is,—is not so much that it did not tend to show that the claims might have been worked by the *drifting process* during the *winters of 1907-8 and 1908-9*, but that it proved the work on which the jury were erroneous instructed to base their estimate of profits, was done by the *hydraulic process* during the *summers of 1910 and 1911*. The results obtained from hydraulicking are no guide to the results that would have been obtained from drifting. Nor is there a particle of evidence that the ground could have been hydraulicked in the summer of 1908.

The seasons during which the hydraulicking was done are admittedly different from the seasons during which it is alleged the drifting was intended to be done. There is no evidence that the rate of wages, cost of supplies, and other expenses necessary in mining would have been the same in the winters of 1907-8 and 1908-9, as they were in the summers of 1910 and 1911; nor that the climatic conditions existing during the winters of 1907-8 and 1908-9 were such as to permit the performance of the same amount of work as was done by hydraulicking during the summers of 1910 and 1911. Unless all the conditions were like, there was no competent evidence to go to the jury on the question of profits.

The fact that the gold was in the ground during the time Daniel was out of possession, is no proof that his lessee would find it at any time during the life of his cause for damages. The record shows that the property, at the time of the execution of the contract between Daniel's assignor and plaintiff in error, was almost wholly undeveloped placer mining ground. The only previous work that had been done upon the claims was by the simple and comparatively inexpensive process of winter drifting (Tr. 32). There was no evidence of values prior to the breach. The value of the claims at the time of the contract, as fixed by the purchase price agreed to be paid, determined the basis of any liability for breach; and this was what was in the minds of the parties at the time the contract was made, and what induced them to enter into the contract relation.

The speculative and contingent character of undeveloped placer claims is well known, and has repeatedly been recognized by the courts. The case is wholly different from that of a well developed quartz mine, where the nature, value, and extent of the ore body, the dip of the vein, the actual cost of extraction, and the other incidents of practical operation, have been definitely determined in advance

of the contract, and are in the minds of the parties when they execute it.

Suppose the Ruhls had agreed to pay plaintiff in error \$100, instead of \$3,540, for the ground in question before they assigned to Daniel; that Daniel's lessee had extracted gold at the rate of \$1,000,-000 a year, instead of approximately at the rate of \$53,000 a year; that Daniel had been kept out of possession for four years instead of two, and that he had waited to commence the action for damages until four years after the filing of the mandate below. Would Daniel be entitled to damages in the shape of interest on 40% of \$4,000,000 during the time he was kept out of possession of the hundred dollar claims? Such speculations as this would seem to illustrate clearly the uncertain and contingent nature of the damages claimed.

"In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony that you should allow him any, you will allow him for the time during which he was kept out of the possession of the property he could have been profitably employed in working the property." (Tr. 47.)

If intelligible, this instruction, assigned as error under specification 8, presupposes a physical impossibility. The defendant in error testified that he was a marine engineer (Tr. p. 31), had offers of

employment as such (Tr. 34), and by reason of his inability to accept a permanent position was prevented from obtaining employment (Tr. 35).

If defendant in error had been employed at his occupation of marine engineer "for the time he was kept out of possession," he could not have been employed in working the mining property in Alaska at any time during the same period. If, *per contra*, he had at any time during the period he was kept out of possession been "profitably employed in working the property," he could not, while so employed, have also been engaged at his occupation of marine engineer.

If defendant in error is entitled to damages for the time he was kept out of possession and could have been profitably employed in working the property, he cannot be awarded damages for loss of earnings at his occupation during any portion of the same period. This would seem incontrovertible at least for such of the time Daniel was out of possession as he could have been profitably employed in working the property.

Following the above instruction, the court directed the jury as follows:

"You may then allow him such *damages* as he

could have earned at his profession or trade, whatever you may call it, less any amount that he may have earned in the meantime, for the time that he was kept out of possession."

This is assigned as error under specification 9. A failure to comprehend its meaning may reasonably be excused. The word "damages," as it occurs in the first line of the instruction (Tr. 55), is clearly erroneous. The plaintiff could earn no *damages* at his profession or trade. The word "meantime" is also ambiguous in connection with the phrase in which it is used; and the language of the whole instruction is much involved.

If the instruction means anything, it assumes that Daniel would have been employed during the entire time he was kept out of possession. This assumption took away from the jury the right to find upon two questions of fact: first, whether Daniel would have been employed at all during the time he was kept out of possession; and, second, if so, for what length of time he would have been so employed. No proof was given or attempted that defendant in error could have been employed during all the time he was kept out of possession. The jury must find the facts from the evidence, and may not assume them.

TRIPLE DAMAGES.

The brief of defendant in error appears not to answer any of the grounds upon which this error is urged (Plff's Bf. 28). We therefore assume that error is conceded.

On the whole record we firmly believe that the judgment of the District Court should be reversed and a new trial granted.

Respectfully submitted,

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